92-1765

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1992, Term

HOUSING AUTHORITY, COUNTY OF SACRAMENTO
A PUBLIC BODY, Respondents

vs.

CULLEN DEVELOPMENT COMPANY, A DISSOLVED PARTNERSHIP, MARK T. CULLEN, AN INDIVIDUAL,
Petitioner.

PETITION FOR REVIEW

To The Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

MARK T. CULLEN
P.O. Box 1215
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PETITIONER, IN PRO SE

QUESTIONS PRESENTED FOR REVIEW

A. Whether due process to have a fair trial on the merits under the Fifth and Fourteenth Amendments, as well as equal protection under the Fourteenth Amendment is deprived when an individual partner (not licensed to practice law) is forced to represent the partnership entity, in pro se, on the eve of trail, in a complex litigation case when counsel abandons the partnership and individual partners.

B. Whether it is proper for the trial court to deny due process when applying the doctrines of Collateral Estoppel and Res Judicata.

C. Whether an Administrative Law decision decided first in time should have Collateral Estoppel effect over a civil Superior Court decision when both forums litigated the same breach of contract issue and came to diametrically opposed decisions violating the one judgment rule.

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OPINIONS BELOW

The Supreme Court of California denied Petition for Review February 10, 1993. A copy is attached as Appendix A of Appendix.

The opinion of the Court of Appeal, Third Appellate District, Case 3 Civil No. CO11217 filed November 20, 1992. A copy is attached as Appendix B of Appendix. A petition for rehearing was denied on Dec. 15, 1992.

The second opinion of the Superior Court filed on April 4, 1991. A copy is attached as Appendix C of Appendix.

The opinion of the Administrative Law Court filed July 25, 1990. A copy is attached as Appendix D of Appendix.

The first opinion of the Superior Court filed on June 21, 1987. A copy is attached as Appendix E of Appendix.

JURISDICTION

This petition for writ of certiorari is taken from a decision rendered on December 30,

1992, by the Supreme Court of California, a court of last resort, in the case styled HOUSING AUTHORITY, COUNTY OF SACRAMENTO, A PUBLIC BODY, v. CULLEN DEVELOPMENT COMPANY, A DISSOLVED PARTNERSHIP, MARK T. CULLEN, AN INDIVIDUAL, Case No. S030563. This Court has jurisdiction pursuant to the provisions of 28 U.S.C.S. §1257(3) (Law. Co-op. 1988).

CONSTITUTIONAL PROVISIONS INVOLVED

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, §1.

"No person shall be . . . deprived of . . . property, without due process of law;" U.S. Const. Amend. V.

STATEMENT OF THE CASE

Cullen Development Company was a California General Partnership comprised of petitioner, Richard Cullen, and James Cullen. The partnership was formed for the sole purpose of doing construction work. Petitioner was the managing and qualifying partner with the California State Contractors License Board. Additionally, petitioner was responsible for providing all of the financial backing for the partnership, whereas, Richard Cullen and James Cullen provided onsite field work.

In 1984, Cullen Development Company entered into four Public Works Construction Contracts with the Housing Authority, County of Sacramento. Late that year problems and disputes developed between the Housing Authority and Cullen Development Company. On or about April 22, 1985, Cullen Development Company filed a Cessation of Work Notice on all four contracts and stopped any, and all, further work with the

Housing Authority.[1]

Thereafter, the Housing Authority sued Cullen Development Company, a general partnership, and petitioner individually, for breach of Contract on the Rio Linda Project and filed four complaints with the California State Contractors License Board. On or about September of 1985, Cullen Development Company, as a partnership, and petitioner, as an individual, employed the Law Firm of Trainor, Robertson, Smits and Wade (hereinafter referred to as "Trainor"), to represent petitioner and Cullen Development Company throughout the litigation, including the filing of four Cross-Complaints as to the four contracts.

On October 25, 1985, Trainor filed a Demurrer to the Housing Authority First Amended Complaint, which was overruled by the court, and an Answer was ordered to be filed. Thereafter, on December 9, 1985, Trainor filed an Answer to

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[1] A detailed discussion of the dispute between the Housing Authority and petitioner may be found in Administrative Law Judge Smith's decision. (Appendix D)

the First Amended Complaint. For reasons unknown to petitioner, Trainor took no further actions for almost 14 months.

On February 5, 1987, Trainor entered into a stipulation (without petitioner's knowledge or approval) with Housing Authority attorney Bleier for the filing of a single cause of action Cross-Complaint on only one contract, the Rio Linda Contract, just thirteen days before the February 18, 1987 scheduled trial date.

On February 6, 1987, **twelve (12) days** before the scheduled trial date, Trainor made a Motion to Amend the Trial Setting Order and to allow for further Law and Motion. This was a direct result of Trainor's **complete failure to prepare for trial**. As an example of how reprehensible and disgusting Trainor's legal representation was, see Declaration of Trainor (dated February 6, 1987).[2] The trial court

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[2] **Declaration of Cullen Attorney Davis [Trainor]**, in pertinent part:

"8. Defendants [Cullens] timely propounded a request for Production of Documents on Plaintiff's [Housing Authority] Counsel. To date defendant's counsel has not reviewed said

denied said request by Trainor. The bottom line is, that Trainor was faced with going to trial on February 18, 1987, **without any pre-trial preparation or discovery**.

On February 24, 1987, Trainor sent petitioner a letter stating that the trial date had been rescheduled to June 16, 1987.

On June 3, 1987, **just thirteen days** before the second scheduled trial date of June 16, 1987, Trainor abandoned legal representation of the partnership, Cullen Development Company, and individual petitioner. Not only were the

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records. At no point in time did plaintiff's counsel represent that said documents could not be removed after the discovery cut-off date. In order to adequately prepare this matter for trial, it is necessary that these documents be reviewed.

9. In addition, Defendant's counsel had no idea that Plaintiff's counsel would be objecting to the discovery cut-off date, given the fact that Plaintiff was agreeing to stipulate to the filing of a Cross-Complaint within thirty (30) days of trial, and giving the fact that the Cross-Defendants will be answering the Cross-Complaint by February 10, 1987.

10. In order to adequately prepare this matter for trial, it will be necessary to depose approximately eight (8) to ten (10) witnesses prior to trial.

11. The above-stated discovery can be completed without jeopardizing the case from going to trial on February 18, 1987..."

individual partners forced to represent themselves, In Pro Se, but the partnership itself was forced into, In Pro Se. Trainor made no explanation to the court as to who was going to represent the partnership. The purpose of said substitution of legal representation by Trainor, was a **last effort delay tactic** by Trainor to continue the June 16, 1987, trial date. At this time petitioner was not aware that Trainor had completely failed to prepare petitioner's case for trial.

On June 8, 1987, Trainor called petitioner, who was residing in Arizona, stating that the court would require a Declaration from petitioner in order to hear a Motion to Continue the scheduled trial date. Trainor dictated the contents of said Motion (dated June 8, 1987) that Trainor requested. Two critical statements in the Declaration were that petitioner allegedly owed Trainor legal fees, and that, petitioner desired to be placed, In Pro Se. Each of these statements were fabricated by

Trainor in order to delay the pending trial date.

At the time of this Declaration, Trainor knew that the firm was paid in full, with extra monies still on retainer.

Then Trainor drafted the Motion to Continue the June 16, 1987, trial date and on June 11, 1987, Trainor made a Special Appearance on petitioner's behalf, anticipating that the Motion would be granted, but the court denied said Continuance.

On the morning of June 16, 1987, petitioner continued the morning trial by making a Calif. CCP §170.6 Motion to recuse the first assigned judge from the case. The case was then trailed to an afternoon hearing on the same date. Shortly thereafter on the advise of Trainor, petitioner as an individual, filed a voluntary Chapter II Bankruptcy Petition with the Federal Bankruptcy Court (Eastern Dist.) before appearing at the afternoon trial on June 16, 1987.

The sole purpose of petitioner's Chapter II filing was to initiate the automatic stay of litigation of the Housing Authority case. Petitioner, thought, and was led to believe by Trainor, that the filing of the Chapter II Petition would stay the Housing Authority trial as it related to petitioner and Cullen Development Company. Petitioner attended the trial, on the afternoon of June 16, 1987, for the sole purpose of having the Federal Bankruptcy Automatic Stay Petition read into the court record. Judge Morris promptly ordered the Petition into the record.[3]

On June 16, 1987, before the trial against unrepresented, individual and partner James Cullen commenced, James Cullen stated he would voluntarily default as he was not prepared, nor capable of representing himself, much less the partnership Cullen Development Company. Petitioner did not actively participate in the

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[3] Mark Cullen presented a copy of his Bankruptcy Petition filed on June 16, 1987. The court thereafter ordered no further action be taken against Mark Cullen.

trial of June 16, 1987, as it related to unrepresented Cullen Development Company and/or himself. Petitioner did request to help translate a few times for James Cullen who suffers from a reading and speech impediment.[4]

On June 16, 1987, after an approximately 15 minute trial, Judge Morris entered a Judgment against James Cullen and Cullen Development Company. However, the trial judge made very clear that the judgment rendered was to have no effect on Mark T. Cullen.[5]

On April 20, 1988, the California State

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[4] "MARK CULLEN: Your Honor, my brother has a little speech problem; do you mind if I speak for him?

THE COURT: Well let me determine to what extent you have this speech problem. Mr. James Cullen, have you understood all we have said here?

MR. JAMES CULLEN: Not really. It's all above my head this level deal."

THE COURT: After Mr. Cullen has had a chance to examine the document.

MR. JAMES CULLEN: Can I get this read to me? My reading is real bad.

[5] "MR. MARK CULLEN: Your Honor, I wouldn't agree that it was against me if I am still a part.

THE COURT: James Cullen and Cullen Development Company.

MR. MARK CULLEN: I'd like the record to state that clearly.

THE COURT: This record states that, . . ."

Contractors License Board caused the California State Attorney General to file an Accusation against Cullen Development Company, and the three individual partners, under various provisions of the California Business and Professions Code. On May 16, 1988, petitioner and Cullen Development Company filed a General Denial to the Contractors State License Board Accusation. The Contractors State License Board Complaint was litigated, in a Judicial Trial Format, for eighteen days in 1989. The Contractors State License Board was represented by Deputy Attorney General June Long, and petitioner represented the partnership and himself, In Pro Se. Testimony was presented by more that eighteen witnesses and over 425 evidentiary documents were entered into evidence. **The Administrative Law decision found, inter alia, that the Housing Authority breached the Rio Linda Contract, that the Housing Authority breached five Implied Covenants, that the Housing Authority committed**

Negligent Misrepresentation, and that the **Housing Authority committed Fraud in Labor Compliance**. On July 25, 1990, the Registrar of Contractors, David R. Phillips, accepted Administrative Law Judge Smith's decision as a **Final Judgment**. (See Appendix D) No appeal was taken by either party. Therefore, after 30 days it became a final order of the court.[6]

It is important to note that this was the first decision as it relates to petitioner on either the complaint or cross-complaint.

On August 14, 1990, petitioner filed a Motion for Leave to File an Amended Cross-Complaint (in the Housing Authority v. Cullen case), accompanied by a Memorandum of Points and Authorities in support thereof, in an effort to remedy the alleged negligent **and fraudulent** conduct of Trainor. On August 30, 1990, the Housing Authority filed an Opposition to

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[6] "The decision became effective 30 days after it was mailed to the respondent [Cullen] unless a reconsideration is ordered within that time ...." Government Code, Title 2 Div. 2, §11519 (a).

petitioner's Motion. Petitioner filed a Reply on September 4, 1990. On September 7, 1990, Superior Court Judge Gray denied petitioner's Motion for Leave to File an Amended Cross-Complaint, on grounds of the court's discretion. Judge Gray referred to the prior stipulation that was entered by the Cullen attorneys.[7]

On September 19, 1990, Trainor sent petitioner a letter referencing a recent Sacramento Bee newspaper article wherein petitioner's favorable Administrative Law decision was written about. Trainor offered to provide legal services to petitioner in the

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[7] "THE COURT: Well, Mr. Campbell, among other reasons for exercising discretion against allowing the amendment was the fact that it was carefully stated in your moving papers how the decision not to add this cross-complaint or to litigate this matter was a tactical decision that was made by the parties. And having made that tactical decision, I think the parties should live with it.

MR. CAMPBELL: Yes, your Honor. The stipulation that was entered at a time just a matter of days before the first trial date. . . ."

After argument by petitioner the court further stated:

"THE COURT: I'm saying that you've made your bed and you can lie in it."

upcoming trial.[8]

On September 26, 1990, the Housing Authority filed a Motion for Summary Judgement on petitioner's individual remaining Cross-Complaint on the Rio Linda Contract. Petitioner filed an Opposition to the Motion for Summary Judgment on October 16, 1990. The Housing Authority filed a Reply to petitioner's Opposition on October 25, 1990. Thereafter, on October 30, 1990, Judge Gray granted Summary Judgment against individual petitioner. The result of this judgment was that petitioner's remaining Cross-Complaint against the Housing Authority was finally dismissed.

Soon thereafter, a trial date was scheduled for February 11, 1991, for the Housing Authority's remaining Complaint against

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[8] In pertinent part:

"I know you must be very happy to have turned the tide and to accomplish this first large step in vindicating the rights of you personally and Cullen Development Company.

The article indicated that you have a November trial date with Mr. Bleier. If you are still in pro per in that litigation, I would be pleased to respond to any inquiries you might have with respect to appropriate litigation strategy."

individual petitioner on the Rio Linda Contract.

The trial began February 11, 1991. One and one-half days into trial, Judge Morris made a ruling on a Motion in Limine (presented by Housing Authority Attorney Campbell), wherein petitioner was disallowed the opportunity to allege his affirmative defenses against the Housing Authority. In effect, petitioner was finally denied the right to have the Housing Authority v. Cullen case tried by the Superior Court in an actual trial format.[9] Before concluding the trial, Judge Morris took under consideration petitioner's Oral Motion that the prior Administrative Law Judgement should have a Collateral Estoppel effect on the Housing Authority's complaint against individual petitioner.

Judge Morris ruled for both the Housing Authority and petitioner to present Post Trial Briefs arguing the issue. On April 4, 1991,

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[9] **Appellant was procedurally barred from presenting his case-in-chief. Further, Appellant was barred from the opportunity to even present a defense.**

Judge Morris ruled on the Collateral Estoppel Issue in favor of the Housing Authority. Appendix C of Appendix.

On April 4, 1991, the Housing Authority's individual judgment against petitioner was filed into the record. Appendix C of Appendix.

On May 29, 1991, petitioner filed an Appeal in the Housing Authority v. Cullen, et.al., case. Third District Court of Appeals: 3 Civil No. C011217.

On November 20, 1992, Honorable Justice Davis, with the Third District Court of Appeals, rendered a 22 page decision (See Appendix B), on the one hand, affirming petitioner's denial of a "trial on the merits" in the underlying Superior Court action. But on the other hand, Justice Davis stated:

> **"Indeed, in light of the findings of the CSLB's administrative law judge, this is not a case where the result bespeaks "justice" in an abstract sense since SCHA is being permitted to recover from a breach occasioned by its own obstructionist bureaucratic conduct."** (See Appendix pp. B-31-B32)

The resultant effect of the Housing Authority case is as follows: petitioner has lost in excess of 2.7 Million dollars (1985 value) and has incurred judgements against him in excess of $2 Million by certain sureties and others. In addition the petitioner has incurred a judgment, of $367,000 in favor of the Housing Authority, against petitioner for Breach of Contract while at the same time the Appellate Court states, it believes the Housing Authority breached the contract. Administrative Law Judge Smith (after 18 days of trial, over 18 witnesses, and in excess of 425 documentary exhibits) found in his decision, that the Housing Authority breached the Rio Linda Contract. (Appendix D)

Succinctly stated, petitioner has been denied the opportunity to present his evidence, or a defense, in the trial court and a judgment has been rendered against him. While at the same time, the facts of the case have proven that the Housing Authority was at fault.

REASONS FOR GRANTING WRIT

I.

A PARTNERSHIP IS A LEGAL ENTITY AND SHOULD ENJOY THE CONSTITUTIONAL RIGHTS, TO EQUAL PROTECTION AND DUE PROCESS OF LAW, AS SHOULD PETITIONER.

The trial court is a state actor, and is mandated to enforce the constitutional rights of each individual (including petitioner) that are guaranteed under the United States Constitution and a state Constitution. Trial courts must afford petitioner, as well as a partnership legal entity, the constitutional safeguards of the due process clauses of the Fourteenth and Fifth Amendments, as well as Equal Protection of the laws under the Fourteenth Amendment.

A partner in a partnership, who is not licensed to practice law should not be forced, or even allowed, by the courts to represent the partnership entity and the other individual partners, In Pro Se. Any judgment therefrom should be illegal. An illegal judgment against a partnership should be void, ab initio, whether the judgment was timely appealed or not. A

partnership, like a corporation, is a separate legal entity. As such, a partnership, like a corporation, cannot represent itself in superior court, in pro se.

> Partnerships are defined under Calif. Corporations Code Section 15006: (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.
>
> California Code of Civil Procedure Section 388, in pertinent part states: (a) Any partnership or unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known.

In support of petitioner's legal conclusion, this Court has taken the opportunity, in a criminal case, to previously set forth guidance on this issue.

In the United States v. A. & P. Trucking Co. (1959) 358 U.S. 121, 79 S.Ct. 203, 3 L.Ed.2d 165, this Court held:

> " . . .that a partnership can violate each of the statutes here in question quite apart from the participation and knowledge of the partners as individuals. The corollary is, of course, that the conviction of a partnership cannot be

> used to punish the individual partners, who might be completely free from personal guilt. As in the case of corporations, the conviction of the entity can lead only to a fine levied on the firms assets."

In the Trucking Co. case, two partnerships were charged as entities, in separate informations with violations of 18 U.S.C. §835, 18 U.S.C.A. §835, which makes it criminal knowingly to violate Interstate Commerce Commission regulations for the safe transportation in interstate commerce of "explosives and other dangerous articles." The District Court dismissed, on motion, the informations on the ground that a partnership entity cannot be guilty of violating the statutes involved. **This Court found that partnerships are entities and that judgments, or fines, can be rendered against these entities separate from the individual partners.**

California case law and public policy, lend support to the emerging position that a partnership is a separate legal entity. In Epstein v. Frank (1981) 125 Cal.App.3d 111,

held:

> ". . . a limited partnership is regarded an entity separate and apart from its partners when it is sued, when it is served with process, and when executing upon its assets. We can perceive of no compelling reason why, in determining the applicability of Code of Civil Procedure section 351, it should not be regarded as an entity, which, like a corporation, is considered . . ." Id. p. 120

The Epstein case goes on further to state:

> "A partnership, however, is not always regarded as an aggregate of individuals. The authorities are replete with instances where the partnership is considered an entity. (See 6 Witkin, Summary of Cal. Law (8th ed. 1974) Entity and Aggregate Theories, §14, pp. 4264-4265.)" Id. p. 119

> "In the area of procedures, a partnership is treated substantially the same as a corporation [Fn 4 omitted], and an entity concept predominates. Thus in order to acquire jurisdiction over a partnership the partnership entity must be designated as the defendant, and the naming of the individual partner is not sufficient. [Citations omitted] The interest of an individual partner in partnership assets is not subject to attachment or execution except on a claim against the partnership. [Citations omitted]." Id. pp. 119-120

Petitioner's position is further supported

by Evans v. Galardi (1976) 16 Cal.3d 300 wherein the California Supreme Court held:

> ". . . we need only point out that a limited partnership is viewed as an entity separate and apart from the limited partners for purposes of suing and being sued. (Code of Civ. Proc. §388. subd. (a); §15526.)[Fn 16 omitted] The limited partner is not a proper party to proceedings by or against the limited partnership (§ 15526), and the limited partnership is not involved in suits against the limited partners in their individual capacity." Id. p. 311

In People v. Sobiek (1973) 30 Cal.App.3d 458 the court held:

> "Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all other partners in the transaction of the partnership business, and the agents of the partnership acting as agents for all of the partners." [Citation omitted] Id. p. 467

> "Thus, given the recent trend in the law in recognizing unincorporated associations as separate legal entities . . ." Id. p. 468

In Promotus Enterprises, Inc. v. Jiminez (1971) 21 Cal.App.3d 560, the court held:

> "We are supported in our conclusion by a recent partnership decision of our Supreme Court, Fazzi

> v. Peters, 68 Cal.2d 590, wherein a copartnership was sued and service was made on all of the partners individually. As the action named only the copartnership as a defendant and did not name as defendants either of the partners individually, the court held that a judgment in personam could not be entered against one not a party to the action and voided the judgment against the individual partners." Id. p. 566

In Fazzi v. Peters (1968) 68 Cal.2d 590, this Court held:

> ". . . an individual judgment may not be rendered against a partner not joined as a defendant in an action against the partnership of which he is, or is alleged to be, a member [Fn 7 Omitted]". Id. p. 597

In addition, there is other sound legal support to conclude a partnership is a separate legal entity, distinct from its individual members.

First, by statute a partner, not licensed to practice law, to a general partnership cannot represent the partnership in legal matters, In Pro Se. (See Calif. B&PC §6125[10])

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[10] "No person shall practice law in this State unless he is an active member of the State Bar." Deerings, B&PC §6125, Page 389.

> "Corporations and partnerships both of which are fictional legal persons, obviously cannot appear for themselves personally. With regard to these two types of business associations, the longstanding and consistent court interpretation of §1654 is that they must be represented by licensed counsel." [Turner v. American Bar Asso. (1975, DC Tex) 407 F. Supp. 451, 476] "Corporations must be represented in court by attorneys admitted to practice, and may not apply through an officer or other lay representative." "The same rule applies to partnerships and other unincorporated associations." [First Amendment Foundation v. Brookfield (1983, ND ILL) 575 F. Supp. 1207.] Partnerships and corporations are independent legal entities. In Vann v. Shilleh (1975) 54 Cal. App.3d 192, the holding is that a corporation cannot appear in pro per. [Clean Air Transport Systems v. San Mateo County Transit Dist. (1988) 198 Cal. App.3d 576] holding that "an unincorporated association must be represented by a licensed attorney." (id. 576).

Secondly, the Federal Bankruptcy Courts, have continually allowed partnerships to file for bankruptcy protection, notwithstanding the fact that the individual partners do not have to file unless they become insolvent, or vise versa. (See generally 11 U.S.C. §303(3), 11 U.S.C. §723, Bankruptcy Rule 2009(e), and

Bankruptcy Form 4)

> "There is no requirement that any partner in a case under Title II file under the same chapter as the partnership or vise versa." U.S. Code & Congressional and Administrative News 5, 95th Congress, 2nd Session 1978, page 6158.

In addition:

> "A partner may file a voluntary case under II U.S.C. 301 whether or not the partnership is a debtor under a case under Title II." U.S. Code & Congressional and Administrative News 5, 95th Congress, 2nd Session 1978, page 6158.

Third, and finally, the underlying trial court determined that petitioner had individual claims separate from the partnership Cullen Development Company. On June 16, 1987, Judge Morris stated:

> "Mark Thomas Cullen has just filed with the court a voluntary petition in bankruptcy under chapter eleven, which was ordered filed in the federal bankruptcy court at 1:20 P.M. this day, and Mr. Mark Cullen, who's present together with James Cullen, has lodged that with the court, and I [the court] will order it filed as a record of this case.
>
> That precludes any further proceedings against defendant Mark Thomas Cullen."

At that point, Judge Morris protected petitioner's individual rights as to the complaint, against petitioner, and petitioner's cross-complaint against the Housing Authority. Honorable Justice Davis made this same conclusion.[11]

This should lead to the correct legal conclusion that "A partnership or other unincorporated association capable of suing or being sued as an entity in the State in which an action is brought should be deemed a citizen of the State where it has its principal place of business, whether such action is brought by or against such partnership or other unincorporated association or by or against any person as an agent or representative thereof.

If the court knew that the general partnership, Cullen Development Company, could not represent itself, In Pro Se, the court intentionally abused its discretion by placing

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[11] On June 16, 1987, no action was taken against Mark T. Cullen on the complaint or on the cross-complaint. Appendix B p. B-8

the partnership, In Pro Se, on the eve of trial. If the court did not realize that a partner could not represent the partnership, In Pro Se, the court clearly erred.

> "Party ordinarily has a right to change his attorney if he wishes to do so, but for the court to approve substitution, it is necessary that it be satisfied the substituted attorneys are qualified by rules of the court to act as attorneys of record in the case." [Piorkowski v. Arabian American Oil Co. (1955, DC NY) 131 F. Supp. 553.]

Since a partner, not licensed to practice law, cannot represent the partnership, In Pro Se, the judgment against the partnership entity, of June 16, 1987, should be void, ab initio, as against the law. It should not matter whether, or not, a timely appeal was filed as an illegal act does not become legal 60 days later.

This Court has not sanctioned the denial of due process of law. As this Court has stated:

> "As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism the "*some* form of hearing" is

> required before the owner is finally deprived of a protected property interest. Board of Regents v Roth, 408 US, at 570-571, n8, 33 L. Ed2d 548, 92 S Ct 2701 (emphasis in original)." Logan v. Zimmerman Brush Company (1982) 455 US 422, 433, 71 L.Ed2d 265, 102 S Ct 1148.
>
> "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. Id. p. 429
>
> In the Logan case, Justice Powell, with whom Justice Renquist joins, concurring in the judgment, stated: "It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds. Our opinion in these areas are often criticized, with justice, as lacking consistency and clarity. Because these issues arise in various settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved." Id. p. 443 Fn.

In addition, petitioner's due process right to have a fair trial on the merits has been violated.

Petitioner has been deprived of having the underlying case heard by a "trial on the merits" in the trial court. The appellate court's

decision sustains that denial of due process.

> "The right to a hearing is one of the rudiments of fair play assured by the Fourteenth Amendment, and there can be no compromise on the footing of convenience or expediency when that minimal requirement has been neglected or ignored." [Endler v. Schutzbank (1968) 68 Cal.2d 162]

The trial, on June 16, 1987, that took place against James Cullen, whom is illiterate and speech impaired should have been stopped by the trial court. A litigant who can not read and understand the complaint against him is not capable of representing his own interests much less the interest of the partnership entity and petitioner. At the same time, this judgment has been used to keep petitioner from having a trial on the merits in the trial court.

Petitioner has been procedurally barred from having his day in court.

> "Privileges granted by statute are embraced within the constitutional right to a day in court, those powers of the courts being limited not alone as to what they may do, but also as to the manner in which they may do it." [Overell v. Overell (1937) 18 Cal. App.2d 499].

The Housing Authority would suffer no harm if petitioner were allowed to have a trial on the merits other than having to prove their own claims. Instead, the Housing Authority has used errors of the trial court to prevent presentation of a "case in chief" by petitioner.

> "Errors at a trial that deprives a litigant of the opportunity to present his version of the case are ordinarily reversible, since there is no way of evaluating whether or not they effected the judgment. A conviction under such circumstances is a miscarriage of justice within the meaning of Cal. Const. Art. VI, §13." People v. Fisher (1984, 2d Dist) 153 Cal. App.3d 826.

Petitioner did not expect to be bound by the June 16, 1987, judgment. In fact, to be sure he wasn't, petitioner asked the trial judge at the end of the hearing if this judgment would have any effect on petitioner and the trial judge clearly stated that it would not. (See Fn. 5, supra)

> "Nevertheless, due process requirements must be met. The non party must have had an identity or community of interest with, and adequate representation by, the losing party in the first action; and

> the circumstances must have been such that the nonparty expected to be bound by the prior adjudication." Lynch v. Glass (1975) 44 Cal. App.3d 948. (7 Witkens, (3rd ed.) Judgements Section 288 (c)).

James Cullen could not adequately represent himself, much less the partnership entity and petitioner. The June 16, 1987, judgment against James Cullen has prevented petitioner from having a trial on the merits against the Housing Authority.

By the trial court not allowing Mark Cullen to litigate the underlying case there has occurred a grave miscarriage of justice and a flagrant violation of petitioner's due process rights. The administrative law decision clearly speaks to which party breached the Rio Linda contract. (Appendix D) If petitioner is allowed a fair trial in the trial court, it is reasonably probable a result more favorable to petitioner will be reached. The court has held:

> "A "miscarriage of justice" constituting grounds for reversal of a judgment under Cal. Const. Art. VI, §13, Evide. Code, §354, should be declared only when the reviewing

> court, after an examination of the entire case, including the evidence, is of the opinion that is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error." Clifton v. Ulis (1976) 17 Cal.3d 99.

The due process clauses of the Fifth and Fourteenth Amendments essentially provide, that no person may be deprived of "life, liberty, or property, without due process of law."

The courts presently engage a balancing of compelling interests of the individual and government in arriving at the nature and scope of due process protection applicable to any particular deprivation. However, the appellate court did no balancing at all, it simply stated: " . . . it comes too late in the day . . ." for Appellant to attack the underlying judgment as violating his due process, notwithstanding the **assurances to Appellant** by the trial court judge that this judgment would have no effect on petitioner. (See Fn. 5)

The Housing Authority has twice been granted a favorable judgement without the trial

court hearing the evidence against them. First, on June 16, 1987, and second, on April 4, 1991.

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. A persons right of cross-examination and confrontation of witnesses against him or her in noncriminal proceedings is a part of the procedural due process guaranteed by both the Fifth and Fourteenth Amendments where there is involved the threat of life, liberty, or property." [13 Cal Jur 3d (Rev) Part 1, Section 291, page 727, 728.]

Petitioner is asking for no more than a hearing "on the merits". Simply put, an opportunity to present evidence and cross-examine witnesses. Certainly this is a request that this Court will reconsider.

> "A hearing before judgment, with full opportunity to present all of the evidence and arguments which the party deems important, is all that can be adjudged vital under the guarantee of due process of law." [Melancon v. Superior Court of Los Angeles County (1954) 42 Cal.2d 698]

It is clear error for the court to allow petitioner to be bound by a judgment without an opportunity for a fair hearing.

> "One of the essential elements of procedural due process is an opportunity for hearing." [L.D. Reeder Contractors v. Higgens Industries, Inc. (1959, CA9 CAL) 265 F.2d 768]. "It is a cardinal principal of due process that no one may be bound or concluded by a judgment, either in respect to his or her person or property, unless that person has had his or her day in court." [Spector v. Superior Court of San Mateo County (1961) 55 Cal.2d 839; People v. Lawrence (1956, 1st Dist) 140 Cal. App.2d 133].

Petitioner respectfully requests that this Court find that Cullen Development Company's and petitioner's right to due process, and equal protection under the law, to have a fair trial on the merits has been violated and accept this case for review.

II.

DUE PROCESS IS AN ELEMENT OF COLLATERAL ESTOPPEL AND RES JUDICATA.

Collateral Estoppel may be applied only if the requirements of due process are met. (Blonder-Tongue v. University Foundation (1971) 402 U.S. 313, 329 [28 L Ed.2d 788, 799, 91 S. Ct. 1434]; Bernhard v. Bank of America (1942) 19 Cal.2d 811; Dillard v. McKnight 34 Cal.2d 214,

215. Due process requires that the non-party have had an identity or community of interest with, **and adequate representation by**, the losing party in the first action. (Emphasis added by appellant) (Zaragosa v. Craven (1949) 33 Cal.2d 315, 321; Rynsburger v. Dairyman's Fertilizer Coop., Inc. (1968) 266 Cal. App.2d 269, 277-278. AOB P. 58

Both Cullen Development Company and petitioner had the right to counsel on June 16, 1987. Notwithstanding that, the court chose to allow Trainor to wrongfully abandon Cullen Development Company and petitioner on the eve of trial. Thereafter, the trial court denied Cullen a continuance of the June 16, 1987, trial date. Then the trial court wrongfully allowed partner James Cullen to represent the partnership entity, Cullen Development Company, in pro se. An illegal act occurred when James was forced to represent a legal entity when he was not licensed to practice law.

"The right to a hearing includes the right to appear by counsel, and

> an arbitrary refusal of such a right constitutes a deprivation of due process." [Powell v. Alabama (1932) 287 US, 77 L. ED. 158, 53 S Ct. 55]. "A constitutional basis for a right to be represented by counsel in non criminal proceedings is found in the due proceed clauses of both the Fifth and Fourteenth Amendments, as well as in the equal protection clause of the Fourteenth Amendment. It applies in a civil administrative hearing, and, in its narrowest definition, it is the right to appear by counsel in all adversary proceeding in which the adversary party has the benefit of or the right to counsel." [Vann v. Shilleh (1975, 2nd Dist) 54 Cal. App.3d 192].

The appellate court found petitioner in privity with the partnership on June 16, 1987, but failed to recognize that a partner to a general partnership cannot represent the partnership, In Pro. Se. Petitioner cited the appellate court to B&PC §6125[12], and the court has side stepped this issue. The court stated: "The short answer to this category of argument is that it comes too late in the day--. . ." (Appendix B, p. B-4)

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[12] "No person shall practice law in this State unless he is an active member of the State Bar." Deerings, B&PC §6125, Page 389.

The appellate court then said:

> "As such, it was his decision (whether voluntarily or as a victim of circumstance) to restrict himself [Appellant] to merely sitting in the court and failing to present any affirmative defenses on the partnership's cross-complaint, allowing judgment to be entered against it, and failing to appeal the adverse decision." (Appendix B, p. B-22)

This position is too simplistic and ignores the underlying facts. The trial court clearly held that the judgment would have no effect on petitioner. Petitioner detrimentally relied on the statements of the trial judge that the trial judgment of June 16, 1987, would have no effect on petitioner. (See Fn. 5)

Our American judicial system is comprised of merged courts of law and equity. While the appellate court rendered its legal duties, the appellate court lost sight of its equitable responsibilities.

By failing to address controlling case law and focussing instead on ostensibly Calif. CCP Section 473, the appellate court failed to use

its **inherent equity power** to overturn the trial court judgment of June 16, 1987, upon which the trial court used, with the appellate court's approval, to bar petitioner from having a trial on the merits.

To that end, the appellate court held: ". . . and counsel's alleged inexcusable behavior cannot be a basis for relief under the trial court's inherent equitable powers." (Appendix B, p. B-23, Fn. 32)

The appellate court's holding is the general rule our case law holds.

> "The general rule expressly recognized is that incompetent counsel or negligence of a party's own attorney is ordinarily no ground for relief from judgment in a civil action." Carrol v. Abbot Laboratories, Inc. (1982) 32 Cal.3d 892.

Notwithstanding this rule, petitioner cited two controlling exceptions which the appellate court failed to give consideration. First,

> "In Carrol v. Abbot Laboratories, Inc., (1982) 32 Cal.3d 892, the court recognized a judicially created exception to the general rule that the negligence of the attorney is

imputed to the client unless shown to be excusable, in cases where the attorney's neglect amounts to positive misconduct by which the client is effectively and unknowingly deprived of representation, and the client himself is relatively free from negligence." 64 ALR4th 323, 351. AOB P. 31, 47

Secondly, "With respect to setting aside a default judgment, it is the policy of the law to favor, whenever possible, a hearing on the merits, and appellate courts are much more disposed to affirm an order where the result is to compel a trial on the merits than they are when the judgment by default is allowed to stand and it appears that a substantial defense could be made. (Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, 525) Stated in another fashion, it is the policy of the law to have every litigated case tried upon the merits, and it looks with disfavor upon a party who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. (Weitz v. Yankosky, 63 Cal.2d 849, 855). [3] Where, as in the case under review, defendant's motion is made more than six months after entry of default, the motion is not directed to the court's statutory power to grant relief for mistake or excusable neglect (Code Civ. Proc., § 473), but is rather submitted to the court's inherent equity power under which, apart from its statutory authority, the court has the power to grant relief from a default judgment where there has been extrinsic fraud

> or mistake. (Hallet v. Slaughter, 22 Cal.2d 552, 557." *Orange Empire* National Bank v. Kirk, 259 Cal. App.2d 347, 352-353. AOB P. 46, 54, 64

The appellate court has failed to recognize the consequences of the alleged negligence and malpractice of Trainor as it effects petitioner in the underlying judgments.[13]

Trainor's withdrawal of legal representation on the eve of trial in a complex litigation case was an "improper abandonment of their client Cullen" in violation of the ethical rule governing withdrawal (Rule 3-700).[14]

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[13] The Cullen attorneys: (1) failed to file the required Government Tort Claims, (2) they failed to timely file Cullen's cross-complaint, (3) the cross-complaint was filed by stipulation 13 days before the Feb. 19, 1987 scheduled trial date, (4) they failed to complete any discovery, (5) they failed to do legal research, and, (6) they substituted out representation of the eve of trial. In effect, the Cullen attorneys failed to provide legal representation for Cullen in the Housing Authority v. Cullen case.

[14] Rule 3-700(A)(2): "In general a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable

Petitioner was an innocent client, not trained in the law, and as such the trial court should have protected petitioner from the positive misconduct and over reaching of Trainor.

> "It is the duty of the trial court to protect the innocent client from the consequences of breach of ethics." (Vann v. Skilleh (1975) 54 Cal. App.3d 192, 197. AOB P. 16

As the appellate court has readily admitted, its decision does not serve justice to petitioner. All appellant is asking for is a trial, whereupon, petitioner will be allowed to litigate his case. Petitioner will do the rest.

> "Although the law ordinarily charges a client with the inexcusable neglect of his attorney, and gives him redress against his counsel, there are exceptional cases in which the client who is relatively free from personal neglect will be relieved from a default or dismissal attributable to the inaction or procrastination of his counsel, particularly where the attorneys failure to represent the client amounts to positive misconduct." Orange Empire National Bank v. Kirk

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laws and rules." Deering's Calif.Codes Annotated Rules (1988), 1993 Supplement.

(1968) 259 Cal. App.2d 347.

California case law has held:

> "Clients should not be forced to act as hawk-like inquisitors of their own counsel, suspicious of every step and quick to switch lawyers. The legal profession knows no worse headache than the client who mistrusts his attorney." Orange Empire National Bank v. Kirk, 259 Cal. App.2d 347, 355

This same legal doctrine should apply to the trial courts. When the trial court stated that the underlying judgment of June 16, 1987, would have no effect on petitioner, petitioner should not be expected to second guess the court as to what that decision meant.

Further, Trainor used a stipulation to extinguish petitioner's rights on three contracts. The elements of Res Judicata, more modernly claim preclusion, are not satisfied by a stipulation. The claims on those three contracts were different than the claims on the Rio Linda Contract.

Petitioner is not asking for a second action on these three contracts, petitioner is

asking for his first action.

The issues to the three contracts were not fully and fairly litigated[15] in the underlying case. The claims were wrongfully stipulated away by Trainor and the court has inherent equitable power to undo that injustice.

Petitioner, as a lay person untrained and unskilled in the law, would have no idea his prior attorneys were stipulating away his right to a trial on three of the underlying contracts.

> "CCP §283, providing that an attorney may bind his client in any of the steps of an action or proceeding, does not give the attorney the right to stipulate away his client's rights without the knowledge or consent of the client." People v. Hy-Lond Enterprises, Inc. (1979) 93 Cal. App.3d 734.

> "The rights growing out of stipulation are similar to those arising from a contract, and the word "contract" is often employed loosely to denominate the rights created by a stipulation. However, when a stipulation is accepted by the court, as it was in this case, there is an additional party or element involved, namely, the court. And it becomes

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[15] Knickerbacker v. City of Stockton (1988) 199 Cal. App. 3d 235, 242.

> necessary, if contrary evidence is to be admitted or considered, for the trial judge to give permission, upon proper request, to a setting aside of the stipulation." Harris v. Spinali Auto Sales, Inc. (1966) 240 Cal. App.2d 447, 453.

Petitioner has not been afforded due process, while at the same time Collateral Estoppel was used to prevent petitioner from putting on any defense to the complaint by the Housing Authority in the underlying action, on April 4, 1991. Further, the trial court affirmed a stipulation as satisfying the elements required for the Doctrine of Res Judicata.

Petitioner respectfully requests this court find a lack of due process and grant review of this case.

III.

AN ADMINISTRATIVE LAW DECISION DECIDED FIRST IN TIME SHOULD HAVE A COLLATERAL ESTOPPEL EFFECT OVER A SUBSEQUENT SUPERIOR COURT DECISION.

As referenced in Appendix B and Appendix E, no judgment was rendered against petitioner on June 16, 1987, on either the underlying

complaint or cross-complaint. In July 1990, Administrative Law Judge Smith found that the Housing Authority breached the Rio Linda Contract. This decision should have prevented the Housing Authority from relitigating the breach of contract issue. Since the doctrine of Collateral Estoppel was not correctly applied by the trial court there now exists conflicting judgments on the record. These judgments have led to a grave miscarriage of justice against petitioner, while at the same time, allowing a windfall profit to the Housing Authority.

The Calif. Supreme Court held:

> California Courts have long agreed that there can be "but one final judgment in an action, and that is one which in effect ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy." Bank of America Nat'l Trust & Sav. Ass'n v. Superior Court (1942) 20 C.2d 697.

This premise and its variations are often referred to as the "One-Final-Judgment Rule."

> In Campbell v. Zokelt (1969) 272 Cal. App.2d 315, 318, held "A decision can be said to be "against

> law" within the meaning of Code of Civil Procedure §657, subd. 6, where findings are irreconcilable (Kralyevich v. Magrini, 172 Cal. App.2d 784, 789". ARB P. 68

The appellate court decision wrongfully affirms the presence of conflicting judgments into the record, by reaching, with skirting language, to support its conclusion on the burdens of proof being different in the two proceedings. In fact, the appellate court goes on to state: "Although there is no precedence specifically involving the present circumstances . . . the CSLB's failure to establish a breach of contract in a proceeding where it had a burden of clear and convincing evidence has no effect in a subsequent proceeding where SCHA need only prove the breach by a preponderance." (Appendix B p. B-21) Petitioner submits a default caused by petitioner's attorneys was not proof by a preponderance of the evidence. It was no evidence at all.

The proceedings to date, in the Housing Authority v. Cullen case, clearly find three

court decisions in stark contrast.

A. THE JUDGMENT OF JUNE 16, 1987.

This trial lasted approximately fifteen minutes against, unrepresented, James Cullen and Cullen Development Company. Plaintiff called a single witness, who testified, and was not cross-examined by defendants. Plaintiff called defendant James Cullen, whom is illiterate and speech impaired. Accordingly, no evidence was presented by the defendants. Nor could it be since the partners could not represent the general partnership, In Pro Se, and more importantly, Cullen's attorneys remained in possession of all of Cullen's documents. Mark Cullen did not appeal this judgment because the trial judge stated very clearly that this judgment would have no effect on him. (See Fn. 5) This trial, without any defense put on by Cullen, found that Cullen Development Company breached the Rio Linda Contract.

B. THE JUDGMENT OF JULY 25, 1990.

This judgment was rendered after a judicial

trial lasting 18 days, which included approximately 18 witnesses providing testimony, and over 425 Documentary exhibits, entered into evidence. This decision found, inter alia, that the Housing Authority breached the Rio Linda Contract.

C. THE JUDGMENT OF APRIL 4, 1991.

After approximately one and one-half days of trial, wherein the Housing Authority was given the opportunity to present its case-in-chief and petitioner was given the opportunity to commence cross-examination of the single witness called, petitioner was then barred from presenting his case-in-chief, by the trial court relying on Torrey Pines Bank v. Superior Court (1989) 216 Cal.App.3d 813. Petitioner argued that this case was developed around a fact pattern much different than petitioners. Notwithstanding that, this decision found that Mark Cullen breached the Rio Linda Contract.

These three judgments are inconsistent. The Housing Authority cannot be allowed to

escape the consequences of its actions, as suggested by the appellate court, by such a simplistic legal maneuver as failure to appeal an illegal judgment, when the underlying record, as a whole, is taken into consideration. These conflicting decisions violate the ONE FINAL JUDGMENT RULE, and as such the appellate court's decision affirms a judgment that is against the law.

On the one hand, the appellate court's decision has decided that the Housing Authority breached the underlying contract (based on the administrative law decision), but on the other hand, the appellate court has decided that petitioner must bear the consequences of said breach. Then, the appellate court held its own decision does not "bespeak "Justice"".

The breach of contract issue was not litigated by the Housing Authority against petitioner on June 16, 1987. Applying the Doctrine of Collateral Estoppel, it should follow that the Housing Authority should have

been denied the opportunity to again litigate the Breach of contract issue that had been previously decided, by Administrative Law Judge Smith. The trial court erred by not following and applying the established case authority, as it relates to Administrative Law Decisions, under the legal Doctrine of Collateral Estoppel. Instead, the trial court set out to fashion its own interpretation of the Doctrine as it relates to Administrative Law Decisions.[16] Although

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[16] The trial court stated:

"(1) While the issues in the administrative hearing and present trial were sufficiently similar (breach of contract and legal excuse therefore), the remedies were sufficiently dissimilar (suspension or revocation of contractors' license and money damages for breach of contract) to preclude a finding of privity between this plaintiff and the complainant, Contractors' State License Board.

(2) The plaintiff herein and the complainant in the administrative action had sufficiently diverse interest to militate against a finding of privity between them.

(3) The standards of proof in the two actions were distinct. Complainant's failure of proof by clear and convincing evidence of a breach of contract in the administrative hearing does not preclude proof of such by a preponderance of the evidence in the instant case.

(4) Defendant herein has additionally failed to allege and prove the finality of the administrative law decision.

(5) This court will not give collateral estoppel effect to an administrative determination that was rendered subsequent in time to the prior determination in this same case in which this Court has previously determined that principles of

the trial court found the issue "Breach of Contract" to be sufficiently similar, it found the Housing Authority not to be in privity with the Attorney General and Contractors License Board. Reported case authority is in contrast to the court's reasoning on the issue of privity.

> "Traditionally, collateral estoppel has been applied to bar relitigation of an issue decided in a prior court proceeding. In order for the doctrine to apply, the issues in the two proceedings must be the same, the prior proceeding must have resulted in a final judgment on the merits, and the same parties or their privies must be involved. (People v. Sims (1982) 32 Cal.3d 468, 484 [].)
>
> "The doctrine was extended in Sims to apply to a final adjudication of an administrative agency of statutory creation so as to preclude relitigation of the same issue in a subsequent criminal case. Our Supreme Court held that Collateral Estoppel applies to such prior adjudications where these requirements are met: (1) the administrative agency acted in a judicial capacity; (2) resolved disputed issues properly before it; and (3) all parties were provided

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collateral estoppel operate against this defendant." (Appendix C)

> with the opportunity to fully and fairly litigate their claims. (id., at p. 479)." County of Los Angeles v. Department of Industrial Relations, 214 Cal. App.3d 1538, 1543-1544.

Which ever decision was correctly decided first in time should preclude the other under the doctrine of collateral estoppel. It is important to, again make clear, that no decision was entered against petitioner on June 16, 1987. The first decision was the Administrative Law decision on July 25, 1990.

Administrative Law Judge Smith's decision, in pertinent part, found that:

> "Cullens abandonment of the Rio Linda Project was with Legal Excuse. SHRD's[17] breaches of covenants and implied warranties, infra, coupled with selfish and incompetent project administration, constituted a material failure of consideration and rendered Cullen's continued performance on the Rio Linda project impracticable due to excessive and unreasonable difficulty and expense. SHRA's administrators significantly interfered with Cullen on the job site and with Cullen's relationships with its bonding companies and

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[17] SHRD is also known as the Housing Authority; aka Sacramento Housing and Redevelopment Agency.

> private line of credit, substantially hampering Cullen's ability to successfully perform." Appendix D., pp. D-9-D-10
>
> "The totality of SHRD's conduct toward Cullen operated to deny Cullen the benefit of its bargain made with SHRD in signing the contract. The material failure of consideration and the impracticability due to excessive and unreasonable difficulty and expense extinguished Cullen's obligation to further perform under the contract and provided Cullen the right to rescind. Cullen exercised that right by filing the Stop Notice." Appendix D., p. D-10
>
> "SHRD's conduct, acts and omissions, as set forth in this finding and its subparts, breached the implied covenant of good faith and fair dealing implied in all contracts executed in California, including the Rio Linda project contract. Seaman's Direct Buying Service, Inc. v. Standard Oil Company of California (1984) 36 Cal.3d 752, 768." Appendix D, p. D-43

The trial court correctly found that, the issue of breach of the Rio Linda Contract, is the same issue in the instant case.

The test relied on as to whether an administrative hearing judge acted in a "judicial character" can be found in the case of Shell Chem. Co., Div. of Shell Oil Company v.

Teamsters L.U. No. 676 (D.N.T. 1973) 353 F. Supp. 480, 485. The hearing was a judicial-like adversary proceeding. Deputy Attorney General June Laverne Long, represented the California Contractors State License Board and Mark Cullen represented himself, in Pro Se. Opening statements were made by both counsel, 18 witnesses were called to testify at the trial that lasted 18 days. Direct and cross-examination, redirect and recross-examination, were available to each counsel, while each witness was under oath. Evidence was introduced and/or excluded according to the rules of the California Evidence Code. The court maintained a complete transcript of the trial (by reporters), along with a copy of all evidence documents. Finally, a written decision with supporting facts was presented at the conclusion of the trial. This trial met with each of the tests required in the Shell Chem. Company case for a judicial proceeding. Therefore, the prior Administrative Law Trial was a trial on the

merits.

All of the parties were presented with the opportunity to fully and fairly litigate their claims. The actual parties listed within the four corners of the accusation document, against Cullen, filed by the California State Attorney General's office were: Contractors State License Board [Petitioner in that case], and Cullen Development Company [Respondent in that case]. However, the "parties in interest" for Contractors State License Board included the Housing Authority of Sacramento County (aka Sacramento Housing and Redevelopment Agency) and the California State Attorney General's Office. Petitioner, in the underlying February 1991 trial, asserted that there was an identity of parties between the Housing Authority, Contractors State License Board, and the California State Attorney General's Office. In contrast, the trial court found this not to be the case.

The California Supreme Court has previously

rendered an opinion about this type of privity issue.

> In People v. Sims (1982) 32 Cal.3d 468, a similar privity problem arose. Up until the Sims case, the courts relied on a decision in People v. La Motte (1979) 92 Cal. App.3d 604, which essentially held that a fair hearing decision absolving the accused for welfare fraud did not bar the district attorney from prosecuting for the same misconduct since the county welfare department was not a party to the criminal proceedings. (Id., at p. 608). People v. Sims, (supra) held that: "La Motte's analysis of the privity requirement is too simplistic. "Privity is essentially a shorthand statement that Collateral Estoppel is to be applied in a given case; there is no universally applicable definition of privity." (Lynch v. Glass (1975) 44 Cal. App.3d 943, 947). The concept refers to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of Collateral Estoppel" (Clemmer v. Hartford Insurance Co. (1978) 22 Cal.3d 865, 875." (Id., People v. Sims (1982) 32 Cal.3d 468, 486-487.) The Sims case (id., p. 487) went on to say: "Here the district attorney's office, which represents the party to be estopped, and the county, the unsuccessfully party in the prior litigation, are "sufficiently close" to warrant applying Collateral Estoppel. Both

> entities are county agencies that represented the interests of the State of California at the respective proceedings. The district attorney's office represents the State of California in the name of the "people" at criminal prosecutions. (See Pen. Code, §684). At fair hearings the County Welfare Department acts as the agent of the state. "[T]he courts have held that agents of the same government are in privity with each other since they represent not their own rights but the right of the government. [Fn. omitted.]" (Lerner v. Los Angeles City Board of Education (1963) 59 Cal.2d 382, 398."

In the underlying Administrative case, the Housing Authority was a party in interest to the Administrative Law decision. The Housing Authority elected the option to file complaints with the California State Contractors License Board, after Cullen Development Company filed a valid Cessation of Work Notice, as well as a Complaint in the Superior Court for money damages for Breach of Contract. The facts substantiate that the Housing Authority filed both complaints. Once the Housing Authority filed a complaint against Cullen with the Contractors License Board the Housing Authority

became a party in interest (ie., they were in privity with the Contractors State License Board and Attorney General). The Contractors State License Board would not have caused an accusation to be filed against Cullen but for the false information the Housing Authority provided to the Contractors License Board investigators and the State Attorney General's Office.

By its own admission the Housing Authority is a "Public Body-Corporate and Politic" (i.e., the Housing Authority's Complaint Caption).

> Blacks Law Dictionary, (1990) 6th Ed, P. 1229, defines a Public Entity as: "Public entity includes a nation, state, county, city and county, or any other political subdivision or public corporation, whether foreign or domestic. Calif. Evid. Code." p. 1228, Public Corporations are defined as an artificial person (e.g. municipality or a governmental corporation) created for the administration of public affairs." "A public corporation is an instrumentality of the state, founded and owned in the public interest, supported by public funds and governed by those deriving their authority from the state."

The Housing Authority is in privity with

the County of Sacramento and the State of California. The Contractors License Board is an agency of the State of California. The California Attorney General's Office is an agency of the State of California. The Housing Authority is a Public Corporation by its own admission, for the County of Sacramento. All county governmental entities located within the State of California report to and are governed by the State of California. Therefore, all three of these agencies are in privity with each other. Each is responsible to the people of the State of California.

> "In addition to the above analysis, Collateral Estoppel may be applied only if the requirements of due process are met. Due process requires that the nonparty (Housing Authority) have had an identity or community of interest with, and adequate representation by the losing party in the first action." Zarazosa v. Craven (1949) 33 Cal.2d 315, 321.

The California Attorney General's Office adequately represented the interests of the People-State of California, the Contractors License Board, and the Housing Authority. Most

certainly, the Housing Authority cannot assert that the California Attorney General's Office was incapable of providing adequate legal representation for them. The Attorney General's case was built upon information and evidentiary documents supplied to them by the Housing Authority and the Contractors License Board. Under the rational of the Sims case, if the Housing Authority had other information to prove Cullen breached the Rio Linda Contract they should have supplied it to the investigators for the Contractors License Board, and/or to the Attorney General.

There are three cases that do lend guidance for the sound conclusion that Administrative Law decisions should have Collateral Estoppel effect over civil trial court decisions. Two are this Court's decisions and the third is a California Supreme Court decision.

> In United States v. Utah Construction and Mining Company (1966) 384 US 394, 16 L Ed2d 642, 86 S Ct 1545, the court held (id., 384 US 421) "although the decision here rests upon the agreement of the

parties as modified by the Wunderlich Act, we note that the result we reach is harmonious with general principals of Collateral Estoppel. Occasionally courts have used language to the effect that res judicata principals do not apply to administrative proceedings, but such language is certainly two broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."

In People v. Sims (1982) 32 Cal.3d 468, the court held "that the administrative decision could properly be accorded Collateral Estoppel effect for purposes of subsequent criminal prosecutions, provided the traditional requirements and policy reasons for applying Collateral Estoppel were also satisfied, since the administrative hearing was a judicial like adversary proceeding, since the administrative agency resolved disputed issues of fact properly before it, and since the hearing procedure provided both parties with and adequate opportunity to fully litigate their claims."

In the case of University of Tennessee v. Elliot (1986) 478 US 788, 797, 92 L Ed2d 635, 106 S Ct 3220, held "We have previously recognized that it is sound policy to apply principals of issue preclusion to the factfinding of administrative bodies acting in a judicial

capacity."

Administrative Law Judge Smith, ruled on the merits in Cullen Development Company's favor. He decided, the factual and legal issues relating to the "Breach of Contract" issue, sought to be Collaterally Estopped by the Mark Cullen.

The trial and appellate courts relied on, inter alia, the Administrative Law court's "Standards of Proof" as not being similar to what the trial court would require. First of all, this reliance does not appear to be an element of any of the reported cases. Secondly, since Judge Smith did not indicate in his decision what standard of proof was used, and no precedence is established, this is a question that remains unanswered.

Next, the trial court relied on the finality of the Administrative Law decision not being pleaded. It is true Mark Cullen did not include that point in his post trial brief, however, such should not be fatal. Even relying

on the trial court's more liberal 60 days after a judgment to file an appeal, the actual time period that had passed was some eight months. The reported cases, and elements of proof do rely on the finality. In no uncertain terms do any of the authorities say the point must be pleaded, just that the decision be final.

In addition, the trial court relied on the remedies of the two cases, as being different. Once again, this does not appear to be an element of any reported cases.

Finally, the trial court relied on the Judgment of June 16, 1987, as being the first judgment on record. No judgment was entered against petitioner on June 16, 1987. The judgment against Cullen Development Company, on June 16, 1987, should be void, ab initio, since it is illegal, for lack of due process and equal protection of the laws, under the United States Constitution.

Petitioner respectfully requests this Court grant review of this case in order to determine

whether an Administrative Law decision decided first in time will have a Collateral Estoppel effect over subsequent litigation.

CONCLUSION

No individual, whether it be a partnership, legal entity or petitioner should be denied due process and equal protection of the law under the United States Constitution, made applicable to each state through the Fourteenth Amendment. At first breadth, the eventual bankruptcy of petitioner may seem unimportant, however, this Court should consider the many other partnership entities that go bankrupt long before reaching this level of litigation.

As signified by the words over the steps to the main entrance to this Court, petitioner is seeking no more than:

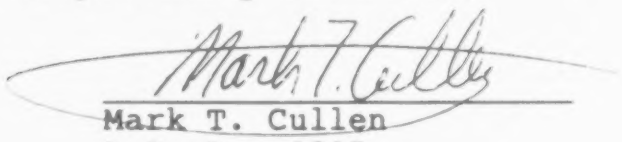
EQUAL JUSTICE UNDER THE LAW

Petitioner respectfully prays that this Court consider the grave effects when due process is denied upon the public, other general partnerships and Cullen, grant this writ, accord

Cullen the process deserved, and order the California Supreme Court to reverse the Court of Appeal, Third Appellate District, to overturn the lower court's denial of Cullen's procedural DUE PROCESS right to receive a fair trial on the merits.

DATED: April 26, 1993

Respectfully submitted,



Mark T. Cullen
P.O. Box 1215
Shingle Springs, CA 95682
PETITIONER, IN PRO SE

APPENDIX A

Third Appellate District No. C011217
S030563

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

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HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO,
RESPONDENT

v.

FILED: FEB. 10, 1993
Robert Wandruff Clerk

MARK T. CULLEN, APPELLANT

==========

Appellant's petition for review DENIED.

LUCAS

Chief Justice

APPENDIX B

NOT TO BE PUBLISHED

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(SACRAMENTO)
FILED: NOVEMBER 20, 1992

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, Plaintiff and Respondent, v. MARK T. CULLEN, Defendant and Appellant.	3 Civ.C011217 (Super.Ct.No. CV331596)

INTRODUCTION

Although what is past is always prologue, in this appeal we must get a particularly long running start to comprehend the nature of the appellate contentions. Plaintiff Housing Authority of Sacramento County (SCHA) filed this action in 1985 for breach of contract against Mark T. Cullen.[18] The Cullens and the

[18] Also named defendants in the amended complaint were James and Richard Cullen and the business in which the three Cullens were partners, Cullen Development Company (hereafter, "the partnership"). Any subsequent undesignated "Mr. Cullen" references will be to Mark Cullen.

partnership filed a cross-complaint for breach of contract in February 1987. At the eventual start of trial in June 1987, Mr. Cullen produced a copy of a petition for voluntary bankruptcy (pursuant to title 11 of the United States Code) that he had just filed in federal court, which the trial court stated "preclude[d] any further proceedings against Defendant Mark Thomas Cullen." Ultimately, the court entered judgment against James and Richard Cullen and the partnership on both the complaint and cross-complaint in 1987.

Following Mr. Cullen's voluntary dismissal of his bankruptcy petition in December 1989, SCHA resumed proceedings against him. In August 1990, Mr. Cullen sought to amend his surviving portion of the cross-complaint (on which the trial court had taken no action) to add causes of action based on his successful defense of his contractor's license in a 1989-1990 disciplinary administrative proceeding instigated by SCHA. The trial court denied the motion without

comment. SCHA then moved for summary judgment on the cross-complaint on the ground of issue-preclusion, based on the fact it had prevailed on the cross-complaint against the other cross-claimants. The trial court granted the motion. Immediately prior to the February 1991 trial against Mr. Cullen, SCHA successfully moved in limine to exclude the introduction of any evidence in support of affirmative defenses which were related to the now-defunct cross-complaint. At the conclusion of trial, the court ruled in favor of SCHA but stayed entry of judgment pending additional argument on any issue-preclusive effect of the administrative proceeding. Ruling (after supplementary briefing) that there was no preclusive effect, the trial court entered judgment against Mr. Cullen in April 1991.

This brings us to Mr. Cullen's pro. per. appellate contentions. He asserts the 1987 judgments entered against the partnership and his partners are invalid because the Cullens

were abandoned by the attorneys representing them and because his bankruptcy stay should have been extended to his co-defendants. He also claims the trial court should never have allowed the attorneys to substitute out of the action, and should have allowed a continuance once they did. The short answer to this category of argument is that it comes too late in the day--the 1987 judgments against the partnership and the other Cullens, never having been appealed, are now final and may not be attacked here by Mr. Cullen either directly or collaterally. Mr. Cullen also challenges the denial of his motion to amend his cross-complaint, the grant of summary judgment on the cross-complaint, the preclusive effect on his affirmative defense accorded to the summary judgment ruling, and the failure to accord the administrative proceeding any preclusive effect in the present action. We shall affirm.

FACTS

To focus (at least initially) on the

transaction which is the subject of the original complaint and cross-complaint, SCHA and the Cullen partnership executed a written contract in August 1984 for construction of a 20-unit low/moderate-income housing project in Rio Linda at 6029 Dry Creek Road. The project was to begin in August 1984 and be substantially completed by March 1985. The partnership stopped work on the project in April 1985, having completed 46 percent of it, and ignored SCHA's demands to finish the job. SCHA took charge of the project and rebid it to another contractor. After deducting a number of credits, the cost to SCHA of completion was approximately $366,000.

In a curious maneuver, SCHA filed both a complaint and an amended complaint for breach of this contract on July 22, 1985. James, Richard, and Mark Cullen filed an unverified answer individually and as Cullen Development Company; they included the affirmative defense of a breach of contract on the part of SCHA, as well

as misrepresentation and fraud by SCHA in the inducement of the contract. For some reason, Tom Cullen also answered, although not named in the amended complaint.[19]

On February 5, 1987, the parties filed a stipulation for an order permitting defendants Cullen and the partnership to file a cross-complaint (despite the pending February 18 trial date) "containing a cause of action for Breach of Contract only." This pleading alleged that SCHA had frustrated the ability of the partnership to complete the project by altering terms and failing to pay for work completed in a timely fashion. On February 19, the case was reset for trial in June 1987 because there were no available courtrooms.

On June 3, 1987, James, Richard, and Mark

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[19] The original complaint included Tom Cullen as a defendant; the amended complaint deleted him. There is no explanation of the change. There were indications at the second trial in this matter that Tom Cullen was not a member of the partnership (although he is a brother of Mr. Cullen). As he is not a significant character in the lawsuits (other than as the executor of numerous proofs of service), we will not further concern ourselves with him.

Cullen filed a substitution of themselves in propria persona for their retained counsel (Trainor, Robertson & Smits); Mark Cullen signed a substitution on behalf of the partnership. Trainor, Robertson & Smits nonetheless appeared "specially" to argue for a continuance of trial, arguing they had substituted out because they had not been paid and their former clients would not be able to find alternative counsel in time for trial. Mark Cullen represented that he and his fellow litigants would be able to come up with the money for new counsel within the next 60 days. The court denied that motion.

On the morning of June 16, Richard Cullen failed to appear for trial and a default judgment was entered against him. Mark Cullen filed a peremptory challenge against the assigned judge, and the matter was reassigned to a different judge for trial that afternoon. When the matter was called for trial at 1:30 p.m., Mark Cullen presented the court with his bankruptcy petition, which had been filed 10

minutes earlier. He remained present at the hearing. After perfunctory questioning of James Cullen and a witness testifying to SCHA's damages, the court ruled against James Cullen and the partnership on SCHA's complaint and on the cross-complaint. No action was taken against Mark Cullen on the complaint or on the cross-complaint. The court initially entered judgment in favor of SCHA only on the complaint against Richard and James Cullen and the partnership; it later amended the judgment to include the cross-complaint. The judgment recited that the partnership had appeared "Pro per by JAMES CULLEN."

In April 1988, the Contractors' State License Board (CSLB) filed an accusation against Mark Cullen's contractor's license. This was based on consumer complaints filed by SCHA in June 1985 alleging the partnership had abandoned the Rio Linda Project and three other projects in April 1985 for which SCHA held contracts with the partnership. In a decision rendered May 22,

1990 (and adopted by the CSLB on June 25, 1990),[20] the administrative law judge found no basis for discipline for abandonment of these four projects because SCHA's conduct rendered performance by the partnership impracticable due to excessive and unreasonable expense and difficulty.[21] The CSLB did impose a 30-day suspension of the license for failure to account

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[20] Mr. Cullen had requested the trial court to take judicial notice of the complaint, accusation, and decision; SCHA raised no objection. We therefore take judicial notice of this decision as an official act of the executive branch. (Evid. Code, §452, subd. (c).) We may take judicial notice of the truth of its findings of fact. (Bach v. McNelis (1989) 207 Cal.App.3d 852, 865.)

[21] To quote a representative passage of the decision, "[SCHA]'s breaches of covenants and implied warranties, infra, coupled with selfish and incompetent project administration, constituted a material failure of consideration and rendered Cullen's continued performance on the Rio Linda project impracticable due to excessive and unreasonable difficulty and expense [SCHA]'s administrators significantly interfered with Cullen on the job site and with Cullen's relationships with its bonding companies and private line of credit, substantially hampering Cullen's ability to [perform successfully]. The totality of [SCHA]'s conduct toward Cullen operated to deny Cullen the benefit of its bargain made with [SCHA] in signing the contract. The material failure of consideration and the impracticability due to excessive and unreasonable difficulty and expense extinguished Cullen's obligation to further perform under the contract and provided Cullen the right to rescind."

properly for funds received on the Rio Linda project.

In September 1990, Mr. Cullen moved for leave to file an amended cross-complaint. According to his notice of motion, these new allegations "were discovered in a recent Administrative Law Case hearing the same legal issues," which was final as to the CSLB. He asserted any delay was reasonable because of his bankruptcy filing. He also claimed he had wished to await the resolution of the CSLB proceeding, since it presented the same factual and legal issues. The proposed cross-complaint now encompassed all four contracts with SCHA and contained causes of action for breach of contract and miscellaneous torts. SCHA opposed the amendment on several grounds: unreasonable delay and concomitant prejudice to SCHA; issue preclusion; failure to comply with procedural prerequisites for filing tort claims against governmental agencies; and the statute of limitations with respect to any new cross-

defendants brought into the action. SCHA's counsel also averred he had stipulated to permitting a cross-complaint to be filed on the eve of the 1987 trial only if it were limited to the single breach-of-contract cause of action. At the hearing on the motion, the court stated it felt the scope of the cross-complaint in 1987 was a tactical compromise by which Mr. Cullen should be bound.[22] The court was also disturbed by expanding the number of contracts at issue from one to four and adding tort claims (although Mr. Cullen expressed his willingness to abandon the tort claims). The court denied the motion "in its discretion."

Shortly after obtaining the order denying this motion to amend, SCHA filed a motion for summary judgment on the original cross-complaint. It argued the issue of whether it had breached the contract with Mr. Cullen

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[22] The trial court thus accepted the truth of SCHA's declaration on this point, which we may not gainsay. (Beckett v. Kaynar Mfg. Co., Inc. (1958) 49 Cal.2d 695, 699; Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal.App.3d 1058, 1077.)

had previously been adjudicated when the trial court had entered judgment against the other cross-complainants (i.e., the partnership and James and Richard Cullen) on the cross-complaint. The court granted the motion "for the reasons stated in the moving party's points and authorities."

In its final procedural salvo against Mr. Cullen, SCHA filed a motion in limine to exclude evidence of damages arising out of facts related to the dismissed cross-complaint. In arguing the motion, SCHA expanded the scope to any "legal excuse to not . . . perform on . . . the contract." The court at first denied the motion. After reexamining SCHA's authority, the court ruled that Mr. Cullen was precluded from introducing any evidence of the conduct on which the cross-complaint was based as an affirmative defense.

During trial, Mr. Cullen raised the CSLB proceedings as a defense, claiming SCHA was precluded from relitigating the question of his

breach of contract. The court told him he would have the opportunity to brief the issue before it rendered a written judgment. After receiving the parties' supplementary briefing, the trial court ruled it would not give an effect to the CSLB decision (giving five bases in its written order). This appeal followed.

DISCUSSION

I

Mr. Cullen's bankruptcy petition has no relevance to these proceedings

Woven throughout Mr. Cullen's brief on appeal are references to the effect of his bankruptcy filing on the validity of the 1987 judgments. We must first purge this spectre from the discussion.

It is true his interest in the partnership is considered part of his bankruptcy estate (In re Manning (10th Cir. 1987) 831 F.2d 205, 207) and therefore any proceeding by a creditor against that interest would be subject to the

automatic stay that is the "fundamental protection provided by the bankruptcy laws" (11 U.S.C. §362, subd. (a) (1); 1 Collier, Bankruptcy Manual (3d ed. 1992) §362.01, p. 362-3; §362.03[1], pp. 362-11 to 362-14).[23] Any action taken in violation of the automatic stay is void and without effect. (In re 48th Street Steakhouse, Inc. (2d Cir. 1987) 835 F.2d 427, 431.)

However, as noted above, SCHA never relied on the preclusive effect of the judgments against the other Cullens and the partnership in connection with its own complaint; rather, it relied on the judgments against the other cross-claimants on the cross-complaint. The automatic stay of the bankruptcy laws do not apply to actions brought by debtors. (1 Collier, op. cit. supra, §362.03, p. 362-15.) Even Mr.

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[23] Moreover, even if the partnership were somehow considered separate from Mr. Cullen's estate, the automatic stay could be applied to it if any judgment against it would in effect be a judgment against the debtor. (A. H. Robins Co., Inc. v. Piccinin (4th Cir. 1986) 788 F.2d 994, 999.)

Cullen admits in one part of his brief that the bankruptcy stay had no effect on the cross-complaint. The trial court refrained from any adjudication of his portion of the cross-complaint not because of the bankruptcy stay but because his cause of action vested in the bankruptcy trustee so Mr. Cullen could not continue to prosecute his action personally, absent an order of the bankruptcy court. (See Lauriton v. Carnation Co. (1989) 215 Cal.App.3d 161, 164-165.)[24] Thus, even assuming the judgment against the partnership on SCHA's complaint is void on its face and thus subject to collateral attack (8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in Trail Court, §6, pp. 410-411; §12, pp. 414-415),[25] it is merely an academic question in the present

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[24] Presumably, the partnership was under no such disability in prosecuting the cross-complaint in its own name. However, the parties have not provided any argument or authority on the point, and we are not inclined to pursue it further.

[25] There is no suggestion by Mr. Cullen that the partnership is somehow directly attacking the prior judgment against it on the complaint. (8 Witkin, op. cit. supra, Judgment, §2, pp. 405-406 [listing various methods of direct attack].)

proceeding--the judgement on the complaint is not being used in any preclusive fashion against Mr. Cullen, and the judgment on the cross-complaint does not suffer a similar disability. We consequently will not consider the bankruptcy stay--or the prior judgment on the complaint--in any subsequent part of the discussion.

II

The trial court correctly disallowed the motion to amend the cross-complaint

The amendment of pleadings is governed by Code of Civil Procedure section 473, which provides in pertinent part, "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading . . . . " While there is a policy of liberality in permitting amendment, the question of whether a particular amendment should be allowed is within the discretion of the trial court. (Moss Estate Co. v. Adler (1953) 41 Cal.2d 581, 585-586 [no abuse in denying leave to amend answer

on eve of trial to assert new defense based on different facts].)

On appeal, the plaintiff attacks the trial court's reliance on the earlier stipulation filed by Trainor, Roberston & Smits that limited the cross-claim to one cause of action. He claims he should not be bound by the actions of counsel which he characterizes as "alleged negligence and malpractice."

All the facts underlying the new contractual causes of action in the proposed amendment to the cross-complaint were within the knowledge of Mr. Cullen and his attorneys at the time of the stipulated cross-complaint in February 1987 (as they related entirely to conduct on the part of SCHA prior to the partnership ceasing work on the four projects in April 1985).[26] In exchange for avoiding the risk of losing the motion for leave to amend on eve of trial (a denial more likely to occur and

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[26] We will take Mr. Cullen at his word that he was willing to waive all other causes of action, thus avoiding the need to address the additional objections by SCHA to them.

be upheld (e.g., Moss Estate Co., supra, 41 Cal.2d at pp. 585-586)), Mr. Cullen's counsel agreed to file a cross-claim limited to the one cause of action for breach of the Rio Linda contract. Mr. Cullen is consequently bound by that stipulation, and the trial court correctly refused to allow amendment in light of it.

It is true a party may seek relief from the effect of a stipulation pursuant to Code of Civil Procedure section 473. (In re Marriage of Carter (1971) 19 Cal.App.3d 479, 489.) However, even if we characterize Mr. Cullen's motion to amend his cross-complaint as incorporating a "pre-motion" to be relieved from the earlier stipulation on the basis of "unknowing[] depriv[ation] of effective representation" (Daley v. County of Butte (1964) 227 Cal.App.2d 380, 392),[27] and even assuming the conduct of Trainor, Robertson & Smits rose to a level

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[27] We have our doubts his papers would satisfy the formalities required for such a motion pursuant to the statute. (See 8 Witkin, op. cit. supra, Attack on Judgment in Trial Court, §167, p. 571.) We need not decide the question, however.

satisfying this standard,[28] the "pre-motion" is untimely under the six-month jurisdictional limitation of the statute. (8 Witkin, op. cit. supra, Attack on Judgment in Trial Court, §169, p. 573.)[29] If indeed Mr. Cullen was badly served by his former counsel making this stipulation, his remedy is not reversal of the trial court's decision denying his motion. (By the same measure, he may not challenge the trial court's failure to prevent Trainor, Robertson & Smits from "abandoning its clients" cross-complaint, its allowing the partnership to proceed in pro.per., or its failure to allow a continuance after counsel substituted out of the

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[28] In light of this assumption, we have not set out any of the facts on which Mr. Cullen bases his claim.

[29] Nor would it be of any succor to construe Mr. Cullen's motion to amend as incorporating a motion to invoke the court's inherent equitable power to relieve him of the effect of the stipulation (8 Witkin, op. cit. supra, §2(5), p. 406; §200, p. 598), assuming arguendo that a stipulation rather than a judgment can be the subject of such a motion. Being a narrower basis of relief than the statutory remedy, one cannot rely on counsel's inexcusable neglect. (Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal.3d 892, 901, fn.8.)

action, since the time for challenging any of these actions had long expired by the time of his motion to amend.)

III

The cause of action in the cross-complaint is precluded by the prior judgment

The doctrine of "res judicata" both bars a second suit between the same parties on the same cause of action ("claim preclusion," in the modern terminology) and estops a party against whom a judgment has been obtained from relitigating in a second proceeding any issues fully and fairly litigated in the first (denominated "issue preclusion"). (Knickerbocker v. City of Stockton (1988) 199 Cal.App.3d 235, 242; Rest.2d Judgments, Introduction to Chapter 1, p. 1.) The elements for application of issue preclusion are (1) whether the issue decided in the first proceeding is identical to the one raised in the second, (2) whether the first proceeding culminated in a final judgment on the merits,

and (3) whether the party against whom issue preclusion is raised was a party or in privity with a party against whom the issue was decided in the first proceeding. (Knickerbocker, supra, 199 Cal.App.3d at p. 244.)

To recapitulate, SCHA's motion for summary judgment on the cross-complaint was based solely on the ground of issue preclusion, SCHA asserting the 1987 judgment against the other cross-claimants on the cross-complaint resolved the issue of whether it had breached the contract on which Mr. Cullen's unamended cross-complaint was based. In essence, Mr. Cullen argues on appeal that application of issue preclusion here is a violation of his due process rights because of the lack of privity between himself and James Cullen, or between James Cullen and the partnership.[30] Be this as it may, it is entirely beside the point.

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[30] He adverts in passing to the absence of a final judgment on the merits, but as he advances neither argument nor authority on this point, it is deemed waived. (People v. Hardy (1992) 2 Cal.4th 86, 150-151.)

As he admits here, and admitted in the trial court, he was the "managing general partner" of the partnership, was "in complete control of all partnership assets, including the instant litigation" (on the cross-complaint), and had full authority for management of the partnership affairs (his fellow partners Richard and James averring they simply supervised the actual construction work). As such, it was his decision (whether voluntarily or as a victim of circumstance) to restrict himself to merely sitting in court and failing to present any affirmative case of the partnership's cross-complaint, allowing judgment to be entered against it, and failing to appeal the adverse decision. As the person controlling the partnership with financial interest in the partnership, the issue-preclusive consequences of the <u>failure</u> to present any case on behalf of the partnership--which is no less "conduct of the action" than affirmatively presenting a case--may permissibly be applied against Mr.

Cullen, since he was in privity with the partnership. "'A person who is not a party to an action but who controls the action is bound by the judgment where he has a proprietary or financial interest in the judgment or in the determination of question of fact or law with reference to the same subject matter or transaction.'" (7 Witkin, Cal. Procedure (1985) Judgment, §295, p. 733; accord Stafford v. Russell (1953) 117 Cal.App.2d 319, 320 [principal stockholder of previously unsuccessful plaintiff corporation bound by judgment against corporation because he had controlled conduct of earlier litigation].)[31] Therefore, there was no obstacle to granting

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[31] Mr. Cullen argued in the trial court that he was denied a full and fair opportunity to litigate the issue of SCHA's breach of contract in the prior action. He does not specifically renew this as a ground for reversal of the trial court's ruling. However, as with his attempt to avoid the effect of the stipulation on his attempt to amend his cross-complaint, any direct attack upon the prior judgment against the partnership on the cross-complaint by means of a motion under Code of Civil Procedure section 473 is untimely, and counsel's alleged inexcusable behavior cannot be a basis for relief under the trial court's inherent equitable powers.

summary judgment on the cross-complaint on the basis of issue preclusion.

IV

The trail court properly granted the motion excluding all evidence tied to the cross-complaint

In granting the motion in limine brought by SCHA, the trial court expressly relied on Torrey Pines Bank v. Superior Court (1989) 216 Cal.App.3d 813. In an extremely abbreviated argument, Mr. Cullen argues against application of this decision on two bases. First, he claims the bankruptcy stay distinguishes the present situation from Torrey Pines. Second, he claims the trial court expressly stated the 1987 judgment "would have no effect on [him]."

In Torrey Pines, the petitioner bank filed an action against a guarantor of a debtor business which had defaulted. The debtor then filed an action against the bank for breaches of fiduciary duty and the covenant of good faith and fair dealing, for negligent

misrepresentation, and for negligence. The guarantor subsequently filed an amended complaint in the debtor's action naming himself as a plaintiff both individually and as the debtor's guarantor. Ultimately, the guarantor filed a dismissal with prejudice of his action. (216 Cal.App.3d at pp. 816-817.) In granting a writ directing entry of summary judgment against the guarantor, the Torrey Pines court held the guarantor's affirmative defenses were barred by the issue-preclusive effect of the dismissal with prejudice (termed a "retraxit") of his own action against the bank, since they were based on the same facts. (Id. at pp. 819-822.) The court relied on Hamilton v. Carpenter (1940) 15 Cal.2d 130, 132-133, in which the Supreme Court had held that the defendants were properly prevented from introducing evidence of fraud as a defense where they had previously brought an action for the identical fraud and had not prevailed.

Given the myriad of ways in which issue

preclusion may occur, the Torrey Pines decision is sufficiently analogous to be controlling here. The gist of Mr. Cullen's cross-complaint was the behavior of SCHA in insisting on performance that varied so substantially from the terms of the written agreement that it constituted a breach. The affirmative defenses to the complaint--breach of contract, misrepresentation, and fraud--depend on the same facts. It is of no import that Torrey Pines involved a separate action rather than a dismissed cross-complaint. It is also of no import that Mr. Cullen (and possibly the partnership) had the benefit of an automatic stay because of his bankruptcy petition; at the risk of endless iterations, it is the issue-preclusive effect of the judgment against the partnership on the cross-complaint--which was not subject to the stay--which bars the introduction of this evidence. Finally, to the extent Mr. Cullen could rely on the trial court's pronouncements at the 1987 "trial," the

quotations to which he refers are directed only to the question of the effect of the 1987 proceedings on the action against him; there is no "promise" that there will be no effect on his cross-complaint. Thus, the trial court properly excluded evidence relating to the cross-complaint.

V

No preclusion results from the CSLB's resolution

Finally, Mr. Cullen challenges the various bases for the trial court's failure to accord any preclusive effect to the CSLB's determination. Since it is sufficient to rely on any one of the trial court's rationales in affirming its ruling, we limit our discussion to the simplest--i.e., the different burden of proof in the two proceedings.[32]

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[32] To recount this portion of the court's ruling, "The standards of proof in the two actions were distinct. Complainant's failure of proof by clear and convincing evidence of a breach of contract in the administrative hearing does not preclude proof of such by a preponderance of the evidence in the instant case."

Although Mr. Cullen devotes a portion of his argument to the proposition, it is not disputed by SCHA that "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court." (Rest.2d Judgments, §83, subd. (1) [emphasis added]; accord County of Los Angeles v. Department of Industrial Relations (1989) 214 Cal.App.3d 1538, 1544.)[33] We have already set out the necessary elements for invocation of issue preclusion, which we will assume arguendo are satisfied here (including privity).[34] However, even where these elements are satisfied, "relitigation of the issue in a

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[33] Therefore, we will eschew any explanation of the requisites and limitations connected with according issue-preclusive effect to an administrative determination. (See Rest.2d Judgments, Introduction to Chapter 6; §83, subds. (2) - (4).)

[34] We note, however, that the presence of privity between the CSLB and the SCHA (which was not a party to the CSLB proceedings and had no control over the litigation) is problematic. (See Rest.2d Judgments, §36, comment f [discussing intragovernmental privity].)

subsequent action . . . is not precluded . . . (4) [where t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action . . ." (Rest.2d Judgments, §28.) As the Restatement explains, "To apply issue preclusion in the cases described in Subsection (4) would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed . . . This is a major reason for the general rule that, even when the parties are the same, an acquittal in a criminal proceeding is not conclusive in a subsequent civil action arising out of the same event." (Id., comment f.)

We have held in past that failure to establish guilt beyond a reasonable doubt in a criminal proceeding has no preclusive effect in a subsequent probation-revocation proceeding between the same parties where an issue need only be established by preponderance of the

evidence. (In re Anderson (1951) 107 Cal.App.2d 670, 672 [cited with approval in Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal.2d 601, 605].) By a parity of reasoning, that an issue has been established by only a mere preponderance in a dependency proceeding is not determinative in a subsequent proceeding between the same parties to terminate parental rights, where the issue must be established by clear and convincing evidence. (In re Nathaniel P. (1989) 211 Cal.App.3d 660, 670-672.)[35]

The burden of proof in an administrative hearing involving the discipline of licensees is clear and convincing evidence. (Realty Projects, Inc. v. Smith (1973) 32 Cal.App.3d 204, 212; Evid. Code, §115.) In the absence of any affirmative showing to the contrary, we presume this is the standard applied in the administrative proceedings under review, even if

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[35] On the other hand, a party's failure to establish a fact even by a mere preponderance is preclusive in a subsequent proceeding with a higher burden of proof. (People v. Sims (1982) 32 Cal.3d 468, 485.)

not specifically recited in the decision. (Feist v. Rowe (1970) 3 Cal.App.3d 404, 422; Evid. Code, §664.) On the other hand, the burden of proof in the present proceedings under review is merely preponderance of the evidence. (Evid. Code, §115.) Although there is no precedent specifically involving the present circumstances, the principle of the Anderson and Nathaniel P. cases mandates that even if the SCHA can be considered to be in privity with the CSLB, the CSLB's failure to establish a breach of contract in a proceeding where it had a burden of clear and convincing evidence has no effect in a subsequent proceeding where SCHA need only prove the breach by a preponderance. Consequently, the court correctly refused to accord the CSLB decision any preclusive effect in the present action.

VI

Mr. Cullen claims the totality of the trial court's action resulted in the denial of his due process rights. Indeed, in light of the

findings of the CSLB's administrative law judge, this is not a case where the result bespeaks "justice" in an abstract sense since SCHA is being permitted to recover for a breach occasioned by its own obstructionist bureaucratic conduct. However, SCHA has been placed in the catbird seat not by the actions of the trial court but by the de facto default of the Cullens and the partnership in 1987 (Mr. Cullen's bankruptcy merely forestalling the inevitable with respect to him).

DISPOSITION

The judgment is affirmed. Neither party shall recover costs.

DAVIS, J.

We concur:

SIMS, Acting P.J.

SCOTLAND, J.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

FILED: APRIL 4, 1991

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, a public body corporate and politic,	NO. 331596 Dept. 6
Plaintiff,	
vs.	ORDER AFTER HEARING RE COLLATERAL ESTOPPEL
MARK T. CULLEN, doing business as CULLEN DEVELOPMENT COMPANY and DOES 1 to 10,	
Defendants.	

By post-trial briefing with points and authorities argued by both plaintiff and defendant, Mark T. Cullen, defendant argues that principals of collateral estoppel should preclude plaintiff from re-litigating the issue of defendant's breach of contract.

The relevant facts on this issue are as follows:

1. Plaintiff obtained a verdict after trial by the court against all defendants with

the exception of Mark T. Cullen on its breach of contract complaint of June 16, 1987. The complaint as to Mark T. Cullen was stayed by virtue of that defendant's bankruptcy action filed in federal court.

2. Mark T. Cullen obtained a favorable result at an administrative hearing brought against him by the Contractors' State License Board wherein he was found by the administrative law judge not to have breached this contract with this plaintiff. Said decision was rendered on June 25, 1990, to become effective on July 25, 1990.

3. Trial in the instant matter was held on February 11 and 13, 1991, wherein this Court ruled in plaintiff's favor on the motion in limine precluding defendant from asserting any affirmative defense under the doctrine of collateral estoppel by virtue of the privity of this defendant with the other defendants in the verdict entered on June 16, 1987.

4. This Court rendered a verdict in favor

of plaintiff and against this defendant on the breach of contract complaint as stated on the record and stayed judgment pending briefing and decision on defendant's collateral estoppel arguments.

The Court finds for plaintiff and against defendant on defendant's collateral estoppel claims as stated hereinafter.

1. While the issues in the administrative hearing and present trial were sufficiently similar (breach of contract and legal excuse therefore), the remedies were sufficiently dissimilar (suspension or revocation of contractors' license and money damages for breach of contract) to preclude a finding of privity between this plaintiff and the complainant, Contractors' State License Board.

2. The plaintiff herein and the complainant in the administrative action had sufficiently diverse interests to militate against a finding of privity between them.

3. The standards of proof in the two actions were distinct. Complainant's failure of proof by clear and convincing evidence of a breach of contract in the administrative hearing does not preclude proof of such by a preponderance of the evidence in the instant case.

4. Defendant herein has additionally failed to allege and prove the finality of the administrative decision.

5. This Court will not give collateral estoppel effect to an administrative determination that was rendered subsequent in time to the prior determination in this same case in which this Court had previously determined that principles of collateral estoppel operate against this defendant.

The verdict rendered herein is confirmed and the stay is lifted. Plaintiff is directed to prepare the judgment.

DATED: April 4, 1991

JAMES I. MORRIS
JUDGE OF THE SUPERIOR COURT

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OF THE COUNTY OF SACRAMENTO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

-oOo- **FILED: APRIL 4, 1991**

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, Plaintiff, v. JAMES CULLEN, et al., Defendants.	NO. 331596 JUDGMENT AS TO DEFENDANT MARK T. MARK T. CULLEN

This cause came on regularly for trial on February 11, 1991 in Department 6 of the above entitled court, Honorable James I. Morris presiding, sitting without jury, a jury having been duly waived. Plaintiff HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO appeared by Alan C. Campbell, its attorney, and Defendant MARK T.

CULLEN appeared in pro per. Evidence, both oral and documentary, having been presented by the parties, the cause having been argued and submitted for decision,

IT IS ADJUDGED, ORDERED, AND DECREED that judgment be, and hereby is, entered in favor of Plaintiff HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO and against Defendant MARK T. CULLEN in the amount of Three Hundred Sixty-Two Thousand Six Hundred One Dollars ($362,601), and that Defendant MARK T. CULLEN takes nothing by his cross-complaint. Plaintiff to recover costs. $1,545.43

Dated: April 4, 1991

JAMES I. MORRIS
Judge of the Superior Court

APPENDIX D

BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

FILED: JUNE 25, 1990

In the Matter of the Accusation Against:	NORTHERN REGION CASE NO. N-87-513
CULLEN DEVELOPMENT COMPANY P.O. Box 1215 Shingle Springs, CA 95682 License No. 448299, B Mark T. Cullen, QP Richard N. Cullen, PT James P. Cullen, PT Respondent	OAH NO. N-31620

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Registrar of Contractors as his Decision in the above-entitled matter.

IT IS FURTHER ORDERED that respondent, CULLEN DEVELOPMENT COMPANY, License No. 448299, on or after August 24, 1990 shall file a bond or post a cash deposit in the amount of $15,000.00

pursuant to and in accordance with the provisions of Section 7071.8 of the Business and Professions Code, and that respondent is hereby notified that practice under the license herein concerned may not be restored until satisfactory evidence of such bond or cash deposit is on file with the Registrar of Contractors.

This Decision shall become effective on the 25th day of July, 1990.

IT IS SO ORDERED June 25, 1990.

DAVID R. PHILLIPS
REGISTRAR OF CONTRACTORS

BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	) NORTHERN REGION)) CASE NO. N-87-513)
CULLEN DEVELOPMENT COMPANY P.O. Box 1215 Shingle Springs, CA 95682 License No. 448299, B Mark T. Cullen, QP Richard N. Cullen, PT James P. Cullen, PT Respondent	) OAH NO. N-31620))))))))

PROPOSED DECISION

Between June 13, 1989 and December 22, 1989, on eighteen days which are of record, in Sacramento, California, Stephen J. Smith, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

June LaVerne Long, Deputy Attorney General, represented complainant.

Mark T. Cullen qualifying partner, Cullen Development Company, appeared in person and

represented himself and Cullen Development Company. James P. Cullen and Richard N. Cullen did not appear.

Evidence was received and the record remained open for the receipt of closing written argument and briefs. Complainant's opening brief and argument was received on February 7, 1990. Respondent's closing brief and argument was received on February 26, 1990. Complainant's reply brief was received on March 14, 1990. The record was closed and the matter was submitted.

FINDINGS OF FACT

I

JURISDICTION AND PRELIMINARY MATTERS

A.T. Lennan, Assistant Regional Deputy, Contractors' State License Board ("the Board"), State of California, made charges and allegations contained in the Accusation in his official capacity pursuant to the authority of Business and Professions Code sections 7090 and 7106.5.

II

LICENSE HISTORY

On November 3, 1983, the Board issued contractor's license number 448299, classification B, general building contractor, to Cullen Development Company ("Cullen"), a general partnership. The partnership listed Mark Cullen as qualifying partner, James Cullen and Richard Cullen as partners. On September 21, 1985, the license was suspended pursuant to the mandate of Code of Civil Procedure section 996.340, for failure to post an adequate contractor's bond. The license expired still suspended on November 30, 1985.

III

CONTRACTS WITH SACRAMENTO HOUSING AND REDEVELOPMENT AGENCY

On December 18, 1984, Cullen Development Company entered into a contract in writing with the Sacramento Housing and Redevelopment Agency ("SHRA") to construct a 20 unit low income housing apartment complex with a separate

laundry building at 6601 Pomegranate Avenue in South Sacramento, California ("the Pomegranate project"). The project was to be constructed for the sum of $684,968.00. Work commenced on the South Sacramento project on March 6, 1984. Work stopped on April 22, 1985 when Cullen filed a Stop Notice pursuant to Civil Code section 3103. At that time, Cullen had been paid the sum of $677,137.00 by SHRA. The work was substantially complete and the apartments were occupied by residents when the Stop Notice was filed, but exterior and interior punch lists were not completed.

On July 23, 1984, Cullen entered into a contract in writing with SHRA for the construction of a 20 unit low income housing apartment complex at 5519 Date Avenue, North Highlands, California ("the Date Avenue project"). The project was to be constructed for the sum of $496,600.00. Work commenced on July 26, 1984, and ceased on April 22, 1985 with the filing by Cullen of a Stop Notice pursuant

to Civil Code section 3103. At that time, Cullen had been paid the sum of $404,664.00 by SHRA.

On August 16, 1984, Cullen entered into a contract in writing with SHRA for the construction of a 20 unit low income housing apartment complex with a separate laundry room at 3025-3031 Dry Creek Road, Rio Linda, California ("the Rio Linda project"). The project was to be constructed for the sum of $744,900. Work commenced on August 20, 1984, and ceased on April 22, 1985 with the filing by Cullen of a Stop Notice pursuant to Civil Code section 3103. At that time, Cullen had been paid the sum of $309.002.00

On December 18, 1984, Cullen contracted in writing with SHRA for the construction of a 16 unit low income housing apartment complex located at 9205 Elk Grove Boulevard, Elk Grove, California ("the Elk Grove project"). The project was to be constructed for a total cost of $649,990.00 Work commenced on a date not

established and ceased on April 22, 1985 with the filing of a Stop Notice by Cullen pursuant to Civil Code section 3103. At the time work was stopped, Cullen had been paid the sum of $19,575.00 by SHRA.

Each of the four above-referenced construction contracts were entirely federally funded by the U.S. Department of Housing and Urban Development ("HUD"). SHRA was the local administrator of the projects, oversaw the construction in accordance with federal guidelines, and disbursed the construction funds obtained from HUD. Every aspect of the projects required advance HUD approval. SHRA had no local budget or funds of its own to assist in the construction of the projects. Each of the four contracts incorporated by reference the general conditions, which were HUD standard form and identical for each contract, special conditions and the architectural drawings. The special conditions and drawings were unique to each contract. Administration of the contracts

by SHRA was to be governed by the uniform HUD general conditions.

IV

ABANDONMENT

It was not contested that Cullen abandoned the Rio Linda construction project with the work 46% completed. The list of work set forth at Paragraph 5 of the Accusation was not completed by Cullen at the time the Stop Notices were filed. At the time Cullen filed the Stop Notices, SHRA had paid Cullen $309,002.00. This sum was 41% of the contract price, unadjusted for extra work required as the work progressed.

Cullen's abandonment of the Rio Linda project work was with legal excuse. SHRA's breaches of covenants and implied warranties, infra, coupled with selfish and incompetent project administration, constituted a material failure of consideration and rendered Cullen's continued performance on the Rio Linda project impracticable due to excessive and unreasonable difficulty and expense. SHRA's administrators

significantly interfered with Cullen on the job site and with Cullen's relationships with its bonding companies and private line of credit, substantially hampering Cullen's ability to successfully perform. The totality of SHRA's conduct toward Cullen operated to deny Cullen the benefit of its bargain made with SHRA in signing the contract. The material failure of consideration and the impracticability due to excessive and unreasonable difficulty and expense extinguished Cullen's obligation to further perform under the contract and provided Cullen the right to rescind. Cullen exercised that right by filing the Stop Notice.

At the time Cullen filed the Stop Notice, it was bankrupt as an entity and its principals were personally bankrupt as well. Although bankruptcy was not necessarily a prerequisite to proof of impracticability of further performance, it was demonstrative of the effects of the material failure of consideration and the excessive and unreasonable difficulty and

expense Cullen encountered. The bankruptcy was in stark contrast to Cullen's stated net worth of $2.7 million at the commencement of work with SHRA 21 months earlier, and included the evaporation of a $1 million line of credit Cullen obtained to assist in performing under the contracts with SHRA. SHRA's architect acknowledged that Cullen bid the Rio Linda project competently and actually in excess of the architect's own estimate of the cost of construction.

V

BREACH OF IMPLIED COVENANTS

The HUD General Conditions, incorporated in the Rio Linda contract, are generally silent regarding the express duties of the Local Housing Authority (SHRA) with respect to the administration of the contracts. However, implied covenants exist in fact and in law that govern SHRA's conduct in its administrative duties. These implied covenants are that SHRA must reasonably and expeditiously process

requests by the contractor for change orders, compensation for extra work and time delays, that SHRA could and would competently and fairly administer the contract, that SHRA would refrain from conduct that could or would deny Cullen the benefit of its bargain or impair Cullen's ability to perform, and that SHRA would conduct itself in accordance with the implied-in-law covenant of good faith and fair dealing. SHRA breached each of these implied covenants in the Rio Linda project contract.

1. IMPLIED COVENANT TO PROCESS CHANGE ORDERS EXPEDITIOUSLY

SHRA's representatives acknowledged that it "held" requests for change orders by the contractor that it considered "too small" to process immediately. These small requests for changes, typically $2,000.00 or less, were accumulated until "enough" such requests had been accumulated to justify the SHRA administrative time required to process them. It was well known that processing was very slow

without such additional delay because HUD was slow to approve such requests. It was known to SHRA that such delays were costly to the contractor in that delays in obtaining authorization for changes delayed the work, denied the contractor prompt compensation for extra work, and frequently required the contractor to reorganize the work. SHRA also knew that it was obligated under the Rio Linda contract to expeditiously process each request for change order received from the contractor, regardless of amount. SHRA representatives acknowledged at the hearing that, despite awareness of this obligation, it refused to promptly process small change order requests until SHRA decided it was administratively reasonable for it to do so.

SHRA breached the implied covenant to process change order requests expeditiously and fairly for Cullen on the Rio Linda project. Although Cullen submitted at least three such requests, one "small" but two of which requested

authorization, compensation and delay time for significant changes to the contract work, SHRA fully processed none of these requests. Only one of these requests made by Cullen was submitted to HUD for approval, and then, only in response to threats from Cullen's attorneys. This request was never approved by HUD or returned to SHRA, and had been delayed for months by SHRA's neglect before the receipt of the threat from Cullen's attorneys. Cullen received no expeditious review of change order requests and no support in making such requests, despite SHRA's knowledge that such delays were difficult and costly for the contractor. SHRA conducted itself unreasonably in stalling or refusing to process Cullen's change order requests.

A course of SHRA conduct in disregarding its obligation to reasonably and expeditiously process change orders submitted by Cullen was already fully developed by the time Cullen submitted his first request for changes on the

Rio Linda project. By the time the Rio Linda project had developed significant construction activity, the Pomegranate project had been under construction for nine months and the Date Avenue project for more than three months. Cullen constructed each of the three projects with staggered starts so that the same subcontractors and office support staff could be used. At the time Cullen submitted its first request for a change order on the Rio Linda project, Cullen had experienced a continuing pattern of frustration and refusal to process its requests for changes on the Pomegranate and Date projects. This pattern had led to a deterioration in the relationship between Cullen and SHRA as Cullen became increasingly vocal in it insistence that SHRA abide by its contract obligations to fairly and expeditiously process its requests. The failure of SHRA to meet these obligations had become very costly to Cullen, and the cumulative effect of SHRA's conduct on the Pomegranate and Date projects became a

significant impairment to Cullen's ability to perform on the Rio Linda project.

For example, Cullen filed five requests for change orders on the Pomegranate project, covering fifteen different changes resulting in additional costs of over $5,000.00, not including administrative time required to file and document the submissions. Two of the five were processed, but resulted, after lengthy delays, in reductions of the amounts due Cullen under the contract of over $2,000.00. The other three were neither fully processed or paid, even though one had been pending for approximately eight months by the time the Stop Notice was filed. On the Date Avenue project, Cullen filed at least one request for a change, for the installation of back water valves, at a cost of approximately $13,000.00. No change order request was fully processed and paid by SHRA on the Date Avenue project before the Stop Notice was filed. Cullen proved that there were a significant number of costly and delay-producing

changes requiring extra work on both projects. Delay in processing the change order requests did not relieve Cullen of the cost and necessity of proceeding with the work, even where the work contractually could not proceed without the change order. Cullen was required by SHRA's conduct to absorb the costs of the changes, all of which were the result of errors and omissions on the construction drawings or the encounter of unanticipated problems at the job sites. By the time the first request for change was submitted on the Rio Linda project, Cullen had already absorbed nearly $20,000.00 in additional costs required by changes to the work of the first two projects, non of which were Cullen's fault.

Although there were numerous errors and omissions on the construction drawings for the Rio Linda project, necessitating significant extra work, no request for a change order submitted by Cullen was ever fully processed and paid by SHRA. Cullen had little choice but to continue construction without approval of the

change orders, facing SHRA threats of the assessment of liquidated damages and breaches of covenants to keep the work progressing and to deliver a completed project on time. In January, 1985, the relationship had deteriorated so significantly that SHRA acknowledged it had withdrawn all cooperation from Cullen, refusing to "hand-hold an inexperienced contractor", and alleging Cullen was not a "team player" for its insistence that SHRA abide by its contractual obligations and compensate it for significant extra work. SHRA's expressed attitude toward Cullen was that two could "play hardball". Cullen's task to obtain change order approval for extra work and compensation was unreasonably difficult before January, 1985. It was impossible after that time.

The general specifications of the contract recognize only two means of authorization for extra work, a change order in advance of work, or a notice to proceed with a stipulated maximum compensation for the work. Both the advance

change and notice to proceed must be in writing to be enforceable by the contractor. Oral promises to pay for changes or extra work were not enforceable, a fact Cullen knew from the outset. SHRA knew that the process for obtaining a change order in advance of the work was very time consuming and thus impractical on time sensitive work such as the Rio Linda project. The process for obtaining a notice to proceed was more expeditious, but unless the notice specified a promise to pay for extra work up to a stated maximum, it was unenforceable. SHRA had abandoned the use of notices to proceed to deal with extra work and changes by the time the Rio Linda project commenced. The general specifications required the contractor to furnish a complete work within a specified number of consecutive days, or suffer the assessment of significant liquidated damages. The general conditions contained a covenant requiring the contractor to exercise all necessary efforts to keep the work progressing

and making progress toward completion.

SHRA used the change order request process, the covenant requiring the contractor to continue to make progress on the work, and the threat of the assessment of liquidated damages to shift the burden of the costs of errors and omissions in the construction drawings and the cost of extra work necessitated by unforeseen problems on the job site to Cullen. Cullen was unaware that SHRA had no additional funds available to pay for costs over and above the contract price, or to pay for changes or extra work. In order to obtain such funds, SHRA would have to make an embarrassing plea to HUD or local funding agencies, all of whom looked upon such costs overrun requests disdainfully and indicative of SHRA's lack of administrative competence. SHRA used the contract provisions to shift the cost burden of these changes and extras to the contractor, thus avoiding the need to obtain additional funds from HUD or local agencies.

Early on n the Pomegranate project, each time Cullen identified an error, omission or problem that required extra work, the SHRA field administrator would aggressively challenge the need and request Cullen continue with the work in order to avoid the need for a change order. Frequently, in response to such aggressive challenges, the cost of small items of extra work would be absorbed by Cullen and disappear into the contractor's overhead and profit in the interest of being a "team player". If it became apparent the item was larger and required a formal change, SHRA had Cullen prepare the submission and then diligently searched for an offsetting reduction at some other place in the work. In this matter, Cullen's first two requests for changes, requesting additional compensation for extra work in the amount of nearly $5,000.00, became a deficit of nearly $2,000.00. However, the work Cullen was required to do did not necessarily decrease with the reduction. For example, after trenching for

the water line and delivering materials on site, Cullen was precluded by the utility from making the water main connection, which had to be made by a contractor chosen by the utility. SHRA not only reduced Cullen's compensation by the amount of the tie-in, billed to them by the utility, but denied Cullen compensation for the work done up to the tie-in, including the trenching.

SHRA unreasonably delayed or refused to process completely all requests submitted by Cullen for extra compensation or delays on all projects submitted after these first two requests. All of these submittals were the result of Cullen being required to perform extra work on the projects due to errors and omissions on the drawings and unanticipated construction problems. Although Cullen's work was not error-free, as evidenced by the reversal of the plumbing in the slabs at Pomegranate, Cullen readily offered to correct errors of its own doing at its own cost. There was no evidence that extra costs associated with correction of

errors caused by Cullen itself materially contributed to Cullen's inability to go forward with the work later. The plumbing reversals were corrected at a minimum additional cost by reversing the structures to match.

SHRA typically blamed HUD for the extraordinary delays in processing of Cullen's submissions for extra work change orders, compensation for extra work and time extensions. SHRA also faulted Cullen for failure to timely for submit change orders and failure to properly document the submittals it did make. Thus, SHRA contends that Cullen's failure to receive compensation for the extra work necessitated on the projects was in part or wholly its own fault. All of these contentions are rejected as wholly without credibility. Any failures on Cullen's part to submit requests for changes were the result of Cullen's reasonable belief that SHRA would not process or pay them. SHRA used changing standards for documentation to stymie Cullen's ability to submit requests for

changes and shift blame for its own delays.

The processing delays blamed upon HUD were sometimes HUD's fault, but many of the requests submitted in evidence never were submitted to HUD by SHRA, or contained unilateral reductions disadvantageous to Cullen made after Cullen had submitted them. The submittals that actually arrived at HUD for processing were never pursued by SHRA on behalf of Cullen. SHRA was content to allow the submittals to remain at HUD indefinitely without following up to assist in expediting the process. The delayed processing of Cullen's submittals for change orders requesting authorization for time extensions and compensation for extra work were to SHRA's advantage. As evidenced by the experience of IBA Construction, the contractor that completed the Rio Linda project, delayed processing of such changes gave SHRA an opportunity to negotiate away some or all of the compensation due the contractor for extra work at the close out of the project, in exchange for a waiver of

the threat of assessing liquidated damages against the contractor's retention. By employing this negotiating technique combined with its own delays in processing requests for compensation for extra work, SHRA attempted to transfer some of the costs of the extra work to the contractor. SHRA was well aware that the contractor was anxious to obtain the retention and avoid the threat of the assessment of liquidated damages. Very few SHRA projects were completed within the contract's time limits, which made the issue of liquidated damages for failure to timely complete the work always an issue. The contractor was at a serious disadvantage in such negotiations.

By January, 1985, Cullen became aware that it was being seriously hampered in it performance by SHRA's failure to compensate Cullen for any extra work performed on any of the three projects. Rather than the advance change order or notice to proceed procedure, the SHRA administrator on the Rio Linda project used

a "field change" procedure for extra work or changes. This procedure consisted of the SHRA administrator's promise to pay Cullen for the extra work if Cullen would keep the work proceeding. If Cullen balked at this obviously unenforceable promise, the SHRA administrator reminded Cullen that it was not conducting itself as a "team player", that Cullen was obligated to continue progress toward a whole and complete project, and that if Cullen delayed the work to wait for written change order or notice to proceed, Cullen would most certainly by assessed liquidated damages when the contract period expired. Faced with such an impossible dilemma, both SHRA and Cullen knew that continuing with construction upon the oral and unenforceable promise to pay was Cullen's only option. SHRA later reneged upon all such oral promises to pay for the extra work, and held the remainder of the incompletely processed change orders to offset their own anticipated costs when Cullen filed the Stop Notices. Cullen

received no additional compensation for significant extra work on the Rio Linda project, even though none of the problems necessitating the extra work were Cullen's fault.

2. IMPLIED COVENANT NOT TO HAMPER CULLEN'S ABILITY TO PERFORM

SHRA's architect acknowledged SHRA was very difficult to work for, characterizing a working relationship with SHRA as "chaotic". According to the architect, SHRA projects were unusually difficult for the contractor, more so than the extra degree of difficulty to be expected in public contracting. The Rio Linda project required an "unusual" number of changes and SHRA made obtaining authorization for compensation for extra work required by those changes very difficult to impossible. SHRA demanded work continue on jobs without a written change order, then reneged upon promises to pay for the work that were made to induce the contractor to continue. SHRA attempted to shift blame for errors and omissions on the drawings and

responsibility for the unanticipated job site problems to Cullen. The architect acknowledged SHRA's field administrative staff did not do their jobs effectively.

In addition to SHRA's refusal to expeditiously and fairly handle the change order/extra work issues on the Rio Linda project, SHRA engaged in additional conduct that excessively and unreasonably increased the burden of construction on Cullen, well beyond the burdens anticipated by the contract. This conduct included unreasonable, unfair and incompetent field administration of the contract, the withdrawal of cooperation and assistance from Cullen coupled with the imposition of different and much more strict administrative requirements, the interference with Cullen's private credit and bond relationships, and the retention of all payments due Cullen on the Rio Linda project for alleged labor compliance violations on the Date Avenue project, in advance of the resolution of those

allegations adverse to Cullen.

At the outset of the relationship between Cullen and SHRA, SHRA tried to assist Cullen in the construction of the projects, to the extent such assistance did not cost SHRA any money. The assistance of SHRA was critical to the ability of Cullen to successfully perform the contracts and achieve the benefit of the bargain it made, and both Cullen and SHRA were well aware of this fact. Almost every aspect of the construction could be made significantly more difficult by SHRA, or smoothed and facilitated, depending upon the approach SHRA took toward the contractor. Particularly for a small contractor inexperienced in public contracting, as Cullen was, SHRA knew that its cooperation and assistance or lack thereof was the point upon which successful performance turned. SHRA's purposeful withdrawal of cooperation and assistance from Cullen in January, 1985 caused an excessive and unreasonable increase in the difficulty of Cullen's work and led to Cullen's

collapse and inability to complete the work. The knowing removal of SHRD's assistance and cooperation was SHRA's response to Cullen's complaints that SHRA was unreasonably hampering its ability to perform and was acting unfairly toward Cullen. SHRA representatives stated it did not have the time to "hand-hold" an "inexperienced contractor with shallow office support" and that is was "not in the business of training inexperienced contractors in public contracting". SHRA's expressed contempt for Cullen in these disparaging statements was matched by SHRA's disregard for its contractual obligations toward Cullen during the construction of the Rio Linda project.

In addition to making the obtaining of written change orders unreasonably difficult, which prevented Cullen from obtaining a legally enforceable right to receive compensation for extra work performed, SHRA's job site administrator on the Rio Linda project significantly hampered Cullen's ability to

perform. This administrator was known to SHRA to be a "nit-picker". On behalf of "having the best interests of the Agency at heart", this administrator added a substantial overlay of undisclosed additional requirements to Cullen's burdens, with the approval of SHRA. The demands he made upon Cullen were unreasonable, as were his inspections. He demanded a level of quality in the work that was well in excess of what SHRA had bargained for or was required by the specifications and drawings. He demanded the retention of the right to dictate the manner and means of construction, in disregard of industry practice that reserved such decisions to the discretion of the contractor. These practices, coupled with an intensely hostile and adversarial relationship with Cullen added substantially to Cullen's costs of construction at a time when cost overruns of the earlier two projects were impairing Cullen's ability to continue. The administrator invariably attempted to shift blame for errors and

omissions on the drawings and unanticipated problems to Cullen, and demanded Cullen remedy the problems at Cullen's cost. By attempting to force Cullen to remedy the errors and omissions without providing an enforceable right to compensation for the extra work, the administrator forced Cullen to become an unwilling financial participant in the construction.

The contracts called for the contractor to be able to furnish a reasonable amount of administrative support and oversight to enable the solution of administrative problems required by HUD-funded projects. Cullen's organization was not inadequate or incapable of meeting reasonable demands. The conduct of SHRA in administering the Rio Linda contract, combined with the circumstances of its administration of the earlier two contracts was incompetent, unfair and unreasonable. Due to SHRA's conduct, performance became much more difficult than anticipated on the Rio Linda contract. Larger

contractors testifying at the hearing made clear the fact that SHRA's administrative practices were a well-developed style of doing business that severely prejudiced the contractor's ability to make overhead costs and any profit at all. Disgusted with SHRA, these larger contractors had enough of their own assets to carry the projects they constructed for SHRA while the same administrative practices were applied to them. Each, however, found some of their expected profit and overhead disappeared into the projects, to the benefit of SHRA. Cullen was not so lucky. Overextended with three such projects being constructed simultaneously and struggling with an uncooperative SHRA, the removal of cooperation and assistance by SHRA in January, 1985, rendered Cullen unable to continue, following exhaustion of all reserves.

SHRA's removal of cooperation and assistance on the Rio Linda project involved a significant change in SHRA's rules governing the

documentation necessary to obtain payment for extra work and to obtain delays in the contract time. In attempting to assist Cullen on the Pomegranate and Date projects, SHRA's field administrator relaxed to some extent the general specifications governing submittals for change orders and time delays, together with supporting documentation. In January, 1985, during a particularly wet winter, SHRA recanted the acceptability of the procedures employed for earlier submittals, which had been in effect for about one year, without warning to Cullen. SHRA demanded strict compliance with the general conditions from that point. In changing the procedures, Cullen was denied nearly a month's inclement weather delay time, and SHRA set up Cullen's failure to comply with the strict requirements of the general specification as justification for SHRA's failure to promptly and expeditiously process Cullen's request for change orders. The timing of the procedural change came at a particularly difficult time for

Cullen, as the cumulative effects of the cost overruns on the first two projects were being felt.

In the late summer or early fall of 1984-1985, the Sacramento County labor compliance officer, under contract to SHRA to oversee labor compliance on the Date Avenue project, had a conversation with Cullen. This untrained and entirely inexperienced officer told Cullen that it could require its carpenters to provide their own power tools and extension cords. He was also aware that Cullen did not pay these carpenters for their setup and rollup time at the beginning and the end of the day, but made no mention to Cullen that the practice was a violation. In the winter of 1985, this same labor compliance officer cited Cullen, without prior warning, for labor compliance violations for failure to pay the carpenters for setup and rollup time, and alleged the requiring of carpenters to furnish their own power tools and extension cords violated the federal labor law.

Cullen complied immediately with all changes the citation demanded, but the citation also sought large fines and penalties for the violations.

In response to the citation, immediately SHRA froze over $82,000.00 due Cullen under the Rio Linda contract, to provide an asset base from which the fines could be recovered in the event they were sustained. The contracts did not require SHRA to take this step and no notice of lien or other asset-freezing action was taken by the County to seize payments due Cullen prior to a hearing of the matter. SHRA froze the payments due on the Rio Linda project even though the incidents alleged occurred on the Date Avenue project. SHRA's position was that "there's law" that permits them to seize payments due on one project to pay for incidents that occurred on another. SHRA further suspended all processing of Cullen requests for change order payments for extra work and held these funds, alleging such action was necessary to insure labor compliance.

Ironically, Cullen proved at the hearing that at least one of the labor compliance claims made against it was an outright fraud, and others may have been. While SHRA held all payments, Cullen was informed by the labor compliance officials that although it had a right to a hearing on the matters, such could take at least two years. Cullen was threatened that if it was considering the exercise of this right, Cullen could be subjected to collateral IRS, Treasury and Attorney General investigations as well, which could be very expensive to defend. With all construction funds being held and experiencing a serious cash deficit, Cullen relented and settled the matter, despite having evidence that at least a portion of the underlying claim was fraudulent. The fines were deducted from Cullen's Rio Linda funds being held. More than two months and significant attorney's fees were required for Cullen to extricate itself from allegations that resulted from the labor compliance officer's

failure to competently perform his duties. SHRA's unilateral freezing of Cullen's rights to payments on an unrelated project severely prejudiced Cullen's already impaired progress in construction and contributed significantly to his inability to complete the project.

The relationship between Cullen and SHRA deteriorated completely in March and April, 1985. In early March, 1985, construction was still progressing on the Rio Linda project, but very slowly. Cullen was very hard pressed for funds and a few of his subcontractors had already filed Stop Notices against the work. SHRA was incensed that Cullen's subcontractors were filing liens against the project, and was very unhappy that construction had nearly stopped. At this time, Cullen's attorneys had served upon SHRA a demand that SHRA release funds due Cullen, immediately process and pay all change orders and promises of compensation for extra work. The letter accused SHRA of bad faith and incompetence in the administration of

the contracts to Cullen's damage. In response, SHRA demanded that Cullen make more progress in construction, and advised Cullen that no more progress payments would be made to Cullen on the Rio Linda project until Cullen cleared all Stop Notices filed against any SHRA project Cullen was constructing and until Cullen obtained unconditional lien releases from all outstanding accounts on all of the projects Cullen as constructing for the Agency. This demand was made just after SHRA released the February progress payment to Cullen in early March, 1985. The demand to obtain unconditional lien releases from all outstanding accounts and to clear all Stop Notices as a pre-condition to the release of any further progress payments on the Rio Linda project was unreasonable. SHRA knew Cullen was experiencing a severe cash flow deficit at the time, and that no subcontractor with his wits still about him would sign an unconditional release as SHRA demanded. Conditioning Cullen's ability to receive

progress payments due on the Rio Linda project upon these unreasonable conditions further hampered Cullen in his ability to perform on that project at a critical period, where each additional impediment to performance was greatly magnified by the dire straits Cullen encountered.

In September, 1984, Cullen assigned all of its rights to payments on each of the four contracts with SHRA to the Bank of America in exchange for a $1 million line of credit. SHRA was notified of the assignment, and complied with it, making all further payments directly to the bank rather than to Cullen. On March 13, 1985, SHRA advised Cullen's bonding company on the Rio Linda project, in writing, that a "problem may exist" with construction progress, and that the bonding company should take "whatever action necessary" to ensure continued construction progress. At the time, SHRA was aware that Cullen was experiencing a severe cash flow problem that had slowed construction to

nearly a standstill, and that SHRA had decided to hold all funds due Cullen on all projects until its demands were met. SHRA thus knew that Cullen's financial condition was highly unlikely to improve, as Cullen's only other source of funds to continue construction was the line of credit at Bank of America. Since this line of credit depended upon the receipt of payments due Cullen from SHRA, and SHRA intended to retain those payments, SHRA knew this source of funding would not last much longer, especially if the bank was aware that the assigned payments would not be forthcoming.

Faced with imminent collapse, Cullen, through its attorneys, arranged with its bonding companies a plan by which the bonding companies would advance the funds to enable Cullen to complete the projects. The plan was dependent upon persuading the Bank of America to subordinate their primary claim to payments due from SHRA on the projects to the bonding companies. The plan failed when SHRA advised

the bank of its threat to assess liquidated damages in excess of $20,000.00 on each of the projects, which would evaporate the remaining funds over projected expenses that could be used to satisfy the bank's advances. In addition to this advisement, which was made three weeks before SHRA formally declared Cullen in default on the projects and the Stop Notices were filed by Cullen, SHRA also advised the bank that it was unwilling to make any concessions that would facilitate Cullen's completion of the projects. In response to SHRA's advisements, the bank terminated Cullen's line of credit and refused Cullen's request to extend credit further in order to continue with the work. The bank also refused to subordinate its interests to the bonding company, which was fatal to the plan.

The unsolicited contacts by SHRA with Cullen's bonding company and bank relative to the Rio Linda project, along with the advisement of the effects of the problems on the other projects, was the final and fatal blow to

Cullen. The advisements served to evaporate both Cullen's private funding and snuff out any possibility the bonding company might have stepped in to allow Cullen to complete the work. SHRA's acts made certain Cullen could not proceed with the work, as the actions removed Cullen's final options. Cullen was left with no choice but to file the Stop Notices and ultimately, for bankruptcy protection.

3. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

SHRA's conduct, acts and omissions, as set forth in this Finding and its subparts, breached the implied covenant of good faith and fair dealing implied in all contracts executed in California, including the Rio Linda project contract. Seaman's Direct Buying Service, Inc. v. Standard Oil Company of California (1984) 36 Cal.3d 752, 768. The cumulative effect of SHRA's conduct up to January, 1985 was very burdensome but not fatal to Cullen. SHRA's acts and omissions from January, 1985, forward, made

Cullen's performance as difficult as possible. SHRA's acknowledgement that it had purposefully withdrawn all cooperation and assistance from Cullen and that it would play "hardball" with Cullen was devastating and ultimately fatal. SHRA knew that Cullen could not possibly complete the work without its cooperation and assistance. The withdrawal of SHRA's support was manifested in the events as set forth, and in a myriad of smaller incidents that served to produce a cumulative effect of Cullen's inability to proceed. SHRA's decision to withdraw all cooperation and assistance from Cullen, and the adoption of a "hardball" approach, in light of all the facts and circumstances extant at the time of the decision, constituted bad faith and a breach of the implied covenant of good faith and fair dealing.

4. IMPLIED WARRANTY OF COMPETENT AND FAIR CONTRACT ADMINISTRATION

SHRA impliedly warranted to Cullen upon the

signing of the contract on the Rio Linda project that it could and would administer the contracts competently and fairly. As set forth in the Finding above and its subparts, SHRA' administration of the Rio Linda project was not competent or fair to Cullen. SHRA's conduct, acts and omissions as set forth breached this implied warranty. Cullen was damaged by this breach in that it lost the benefit of its bargain on the contract and encountered severe financial losses as this loss was combined with the effects of the failures of the other three projects for SHRA.

5. IMPLIED WARRANTY OF ACCURATE CONSTRUCTION DRAWINGS

SHRA impliedly warranted the accuracy of the construction drawings when those drawings were furnished to Cullen for the purpose of making its bids. Souza and McCue Construction Company v. Superior Court (1962) 57 Cal.2d 508, 510-11. Cullen relied upon the drawings in making its bid on the Rio Linda project. The

drawings were filled with errors and omissions, more than could or should have been expected. These errors and omissions created problems that required extra work by Cullen to resolve. The error and omission-laden drawings upon which Cullen relied breached the implied warranty that the drawings were accurate and reliable for use in conformity with their stated purpose. The breach damaged Cullen in that it was required to correct the errors and omissions as reflected in the construction as it progressed. SHRA compounded the damage by its conduct regarding change orders and compensation to Cullen for the extra work the corrections required.

VI

RESCISSION

The conduct, acts, omissions and breaches of SHRA as set forth in Finding V and its subparts constituted a material failure of consideration for the Rio Linda project on the part of SHRA. The same conduct, acts, omissions and breaches by SHRA made Cullen's continued

performance on the Rio Linda contract impracticable in that continued performance became excessively and unreasonably difficult and expensive. Although Cullen's performance on the Rio Linda project was not perfect, it was not established that Cullen was at fault in any significant manner for the failures that occurred. Cullen, a small and inexperienced contractor, overextended himself by taking on four substantial contracts with a notoriously difficult public agency. Conducting construction on the four contracts simultaneously was, in retrospect, a poor, but not necessarily fatal plan. However, Cullen was not advised in advance of the innumerable and unforeseeable problems it would encounter with SHRA itself and the manner in which SHRA would conduct itself. Cullen competently bid the projects and was adequately capitalized. The evidence does not lend itself to the conclusion that Cullen could not have completed the Rio Linda contract, although perhaps without

obtaining the benefit of overhead and profit, or even at a loss, in the absence of the acts, omissions, conduct and breaches Cullen experienced, both on the Rio Linda project, and the cumulative effect of the same on the earlier projects as it came to bear on the Rio Linda work. As SHRA's conduct caused a material failure of consideration, Cullen obtained the right to rescind the Rio Linda contract. Cullen exercised that right and declared the contract rescinded with the filing of its Stop Notice of April 22, 1985.

VII

FRAUD IN THE INDUCEMENT

It was not established that SHRA intentionally defrauded Cullen to induce entry into the four construction contracts. Although SHRA had informally developed a significant set of administrative practices to be used in the oversight of each of the contracts, and these practices were unknown and not reasonably knowable to Cullen at the time the contracts

were signed, there was no evidence that these administrative practices had been formally adopted by SHRA or were mandatory upon their contract administration personnel. Rather than being formal administrative practices, these procedures were an informal and selfish method of getting the work done with the interest of SHRA preeminent, and in disregard of the interests of the contractor. It was apparent that these practices preexisted the Cullen-built projects, and were applied to its successors as well. Little thought was given to the expansion and development of these administrative practices into a comprehensive style of doing business, which was the stage of development Cullen encountered when it commenced work on the projects. Less thought was given, at the time the contracts were entered into, that such administrative practices would have an inordinately burdensome effect upon a small contractor such as Cullen. SHRA ordinarily contracted with large firms for work, which were

much better able to absorb the additional costs and in-house administrative burdens these practices created. The evidence fails to disclose a knowing and intentional deception on the part of SHRA to induce Cullen to enter into the contracts, knowing that the undisclosed administrative procedures of SHRA would defeat its ability to successfully perform. Although SHRA knew Cullen was inexperienced, at the time the contracts were signed, SHRA intended to cooperate with and assist Cullen to perform. SHRA did not deceive Cullen into entering a contract relationship SHRA knew in advance would be impossible for Cullen to perform.

VIII

NEGLIGENT MISREPRESENTATION

SHRA negligently misrepresented to Cullen that SHRA could and would competently and fairly administer the contracts between Cullen and SHRA, that they would administer the contracts in accordance with the general and specific conditions, and that they would assist Cullen

and not do anything to hamper its ability to perform. SHRA failed to disclose to Cullen administrative practices that Cullen could not reasonably have discovered. Cullen was known to be particularly unfamiliar with SHRA/HUD projects. Despite intentions to assist Cullen in performing under the contracts, SHRA knew or should have known that its administrative practices were quite uncommon in the construction industry and the application of these practices to a small and inexperienced contractor such as Cullen would substantially increase its costs and administrative burdens, significantly hampering performance. SHRA's contention that Cullen was responsible for learning of these practices on his own and should have informed himself of the way SHRA does business before entering the contract lacks merit. For example, it was impossible for Cullen to learn from any source that SHRA intended to disregard the obligation to promptly process change orders requests if SHRA, in its

exclusive discretion, determined the change order was "too small".

No effort was made by SHRA to inform Cullen of the administrative practices or to assist with compliance. Instead Cullen was told that the contract would be administered by the "book". Based upon these negligent misrepresentations Cullen made its bids and obtained the contracts. None of the extra costs associated with additions or delays to the work that resulted from SHRA's application of those administrative practices were included in the bids. As a direct and proximate result of these negligent misrepresentations, Cullen entered into the contracts, which proved to be impracticable of performance, as set forth.

IX

FAILURE TO COMPLETE THE RIO LINDA PROJECT FOR THE CONTRACT AMOUNT

It was undisputed that Cullen quit work on the Rio Linda project when the work was 46% complete. Cullen was actually paid $309,002.00

for this work. The amount SHRA paid Cullen was 41.48% of the contract amount of $744,000.00, without any compensation for extra work Cullen actually performed. Forty-six percent of the contract price is $342,654.00. Cullen was underpaid $33,652.00 for the work it did complete. There was no credible evidence that this work was inadequate or failed to meet code or trade standards. The architect inspected and approved this work, as did SHRA's inspector, and both approved the percentage of acceptable completion. The work had additionally passed all required County building inspections as in compliance with building codes.

It was also undisputed that Cullen performed extra work on the Rio Linda project for which he was not paid. The amount of this work was significant but not proven in a specific dollar amount. The architect's letter of September 6, 1984 details five significant changes, and the record details others, such as the installation of attic wall separations,

adjustments to the concrete slabs required by SHRA, changes to support handicapped sinks, changes of location of medicine cabinets, treatment of cuts to pressure treated lumber, requiring Cullen to resolve off-site drainage, fencing and easement problems, requiring Cullen to redesign the architect's sprinkler system, relocation of windows that were spotted on the plans in violation of the local building code, being required to install 4 inch plumbing in less than 4 inch walls, and so on.

There was no dispute that Cullen did not complete the work on the Rio Linda project for the contract amount. Cullen completed only a portion of the work, for which it was paid a smaller proportion of the construction funds payable under the contract, as set forth above. Cullen's withdrawal from work at the Rio Linda project was legally justified, as set forth in Finding V and VI. The contractor is ordinarily obligated to complete work for which it contracts, even if continued performance becomes

unprofitable or difficult. A contractor is required to continue to perform, even if it is losing money and experiences cost overruns. However, the contract obligations to complete the work for the contract price are extinguished with the contract. Cullen rescinded the contract for the reasons set forth, and the rescission was reasonable under the totality of the circumstances. Therefore, Cullen's obligation to complete the contract performance for the contract amount was extinguished along with the contract itself.

As the contract and its performance obligations were extinguished by the recision by Cullen, a claim of restitution for the costs to complete performance is without merit. There is no continuing obligation to perform that was abandoned upon which an obligation to respond in restitution may be founded. SHRA's claim for restitution is particularly unfair under these circumstances. Cullen was underpaid for the work it did complete, and was not paid at all

for extra work. SHRA held up other rights to payment to provide funds against which unrelated project claims might be made. SHRA unreasonably and unjustifiably delayed the later completion of the Rio Linda project, causing ultimate completion to become significantly more expensive than it should have been. This unreasonable delay caused the wastage of properly completed work, the destruction of materials, and substantial and unnecessary security expenses.

The claim of restitution for amounts unpaid to Cullen's subcontractors who also filed Stop Notices is similarly without merit. Cullen received his last payment form SHRA on the Rio Linda project in early March, 1985. This progress payment was made for work completed in February, 1985. Cullen used this last disbursement to pay subcontractors for work rendered in February or before, including the payment of a couple of Stop Notices filed earlier. Work by subcontractors performed in

March, 1985, or work performed earlier but not invoiced until March were not paid because SHRA did not pay Cullen for that work. SHRA retained all further monies due to protect themselves as previously set forth. Cullen advised these unpaid subcontractors to file Stop Notices with SHRA, because any additional monies due Cullen would be first applied to these claims. Cullen alleged SHRA owed it in excess of $70,000.00 at the time, which was nearly enough to cover all claims. Cullen also knew its bonding company would be required to respond, which would provide additional funds. SHRA has refused to pay Cullen any of the funds due, which precludes the subcontractors from being paid. SHRA further ignored the subcontractor's claims against the project and applied every cent of the bonding company's settlement to the completion of the project. Under these circumstances, Cullen cannot be faulted for failure to make payment on subcontractor's Stop Notice claims for which Cullen had not been paid

by SHRA. SHRA refused to pay Cullen not only funds earned for some if not all of the work covered by the Stop Notices, but also for extra work performed by some of these same subcontractors. These funds were earmarked for the subcontractors due to the priority of the Stop Notices. Cullen had no control over the distribution of these funds and no funds of its own from which payment could be made.

It was not established that Cullen misapplied construction funds received on the Rio Linda project, to the prejudice of these subcontractors. No expenses listed by Cullen in accounting for the funds received from SHRA were demonstrated to have been inappropriate. Although Cullen's records were not entirely adequate, as set forth, Cullen credibly contended the listing of expenditures was complete and accurate.

X

ACCOUNTING FOR THE USE OF FUNDS PAID ON THE RIO LINDA PROJECT

Cullen Development failed to substantially account for the application or use of the funds received form SHRA on the Rio Linda project. Although Cullen presented each and every canceled check and a summary of those checks, such is inadequate evidence of substantial accounting. Having invoices for the expenditures would have been helpful but not essential. Substantial accounting means any sort of record keeping system that allows an outside examiner to verify that the expenditures stated were actually related to the project in question. The records presented by Cullen do not permit this sort of independent evaluation.

There is no doubt that the funds received by Cullen from SHRA on the Rio Linda project were properly applied to the project, as Cullen's testimony accompanying the canceled checks and summary was credible and supported by the remainder of the evidence as well. Although some of the individual expenditures were called into question, none were demonstrated to be

other than related to the project. For example, office rent costs were questioned, but it was clear that SHRA required the contractor to have an office and office support for the administration of the project. These costs were part of the contractor's overhead. The records presented, it should be noted, demonstrate the expenditure of $332,916.51 of Cullen Development Company funds on the Rio Linda project. Cullen received only $302,009.00 from SHRA for the same work. This approximately 10% cost overrun is consistent with Cullen's testimony that it experienced 10-12% cost overruns on each of the projects.

Although the record makes apparent Cullen appropriately used the funds, its record keeping was inadequate to permit an independent verification of that fact from the records themselves. As such, the records themselves fail to substantially account for the project expenditures. The failure is mitigated by the proof that there was no misapplication of those

same funds.

For the above reasons, the allegations that Cullen misapplied or diverted funds from the Rio Linda project due to the fact that some of Cullen's subcontractors did not receive payments for work on the project must fail. As set forth in Finding IX, the failure to pay subcontractors's Stop Notices is directly attributable to SHRA's retention of funds earned and due Cullen, and Cullen's ultimate bankruptcy. Misapplication or diversion of the funds to inappropriate purposes was not proven. There was little evidence that funds Cullen did receive was for work the unpaid subcontractors furnished to the project or that payment received should have been earmarked for payment to these subcontractors. Cullen paid out substantially more than he received on the Rio Linda project, but there was still a shortfall. The fact that some subcontractors did not receive payments for their work does not establish, without more evidence, that Cullen

applied funds received improperly.

XI

FAILURE TO FURNISH RECORDS TO THE BOARD

It was not established that Cullen refused to make available records pertaining to all four projects to the representative of the Contractors State License Board when requested on April 17, 1986 and December 11, 1987. The complaints were received by the Board in June, 1985. Investigation was not commenced on the matter until April, 1986, due to a backlog of cases. On April 17, 1986, the Board served upon Cullen a request for records of the four projects. On May 10, 1986, Tom Cullen, on behalf of Cullen Development, responded to the Board's investigator that all records of the projects were either turned over to attorneys due to litigation having been commenced over the projects, or were in the possession of SHRA. The letter requested the name of a Board representative Cullen could speak with regarding the case. Mark Cullen followed up the letter

with a telephone call to the Board's investigator. In the phone call, Cullen agreed to furnish the records when he was able, and asked for an extension of time because the records were being used in litigation with SHRA. The requested extension was granted, although the investigator did not believe he would be granted access to the records due to the nature of the case. The matter was shelved by the Board for the next eight months due to transfers of caseloads within the Board's investigative staff. No response was made to Cullen in this period, and due to the long passage of time without follow-up by the investigator, Cullen believed the matter had been resolved.

On December 11, 1987, the Board's investigator, after having reactivated the investigation, again requested Cullen's records. Mark Cullen responded to the letter on the telephone and in writing, and agreed to furnish the requested records, advised of the status of litigation between Cullen and SHRA, and

requested an extension of time to compile the voluminous material until late January, 1988. Cullen advised in the same letter that litigation was continuing with SHRA, requiring him to continue to need the originals of the documents, but that Cullen was copying files and would forward the copies.

On February 18, 1989, Mark Cullen wrote the Board's investigator to request a further extension of time within which to comply with the Board's request for examination of Cullen's documents. Cullen requested an additional 90 days due to the fact that a significant amount of documentation had been required by the Internal Revenue Service for an audit, and other documents were in Arizona. Cullen advised the audit was not completed, and the additional time would permit him to assemble and furnish the copies. The Board's investigator did not respond to the request other than to assist in the filing of the Accusation against Cullen containing one allegation that Cullen refused to

furnish the documents.

Following the filing of Accusation, Cullen furnished all the documents requested, and more, as part of prehearing discovery. The documents were all organized, indexed and tabbed for easy reference, and it was not contended, nor could it be, that the documentation was not complete in every respect, excepting the accounting for the expenditure of Rio Linda funds, as set forth previously.

Although no actual exchange of documents occurred in response to the Board's investigator's requests before the filing of the Accusation, there was no proof that the failure was due to Cullen's refusal to provide the documents. The documents are voluminous, filling numerous boxes, and were subject to at least two other claims on their use before they could be made available to the investigator. Cullen never refused to provide the documents, and maintained contact with the investigator after the case had been again activated. The

investigator did not pursue the matter diligently for a number of reasons, including his belief that Cullen would not comply with the request. Although there are times where a failure to furnish the requested documents following two written requests therefor equates to a refusal to furnish them, under these circumstances the failure to furnish was not the result of Cullen's refusal to comply.

XII

OTHER MATTERS

It was not established that Richard N. Cullen and/or James P. Cullen had any knowledge of or participated in any of the events surrounding the Rio Linda project or its failure. Mark T. Cullen and Tom Cullen were the active principals of Cullen Development on the Rio Linda project, with Tom Cullen acting as construction superintendent, and Mark Cullen as partner in charge of all operations. The roles of James and Richard Cullen in the partnership were not established.

Mark Cullen has been in the real estate development and construction business for about seven years. During this period, he has expanded operations from the remodeling of existing single family homes for investment purposes to original construction as a general contractor. Cullen, through his companies, Niscull Investment Corporation and Cullen Development Company, has built single family and multiple family residential units, residential facilities for the elderly, and a branch courthouse facility for the County of El Dorado. The largest project Cullen had previously built was valued at $274,000. Cullen's experience in public contracting was limited to the branch courthouse and an extensive base housing remodeling project for the U.S. Air Force. Cullen had excellent references, excellent credit and had never failed to complete a project in a timely fashion for the contract price before the projects with SHRA. He is personally involved in bankruptcy proceedings,

as is Cullen Development Company. The litigation between Cullen Development Company and SHRA is not yet completed, and Cullen Development is still subject to lawsuits from its bonding companies. Mark Cullen wants to retain his contractor's license although he realizes that it will take a substantial period of time to resolve all the pending matters that resulted from the failures of the projects for SHRA. Cullen is not currently contracting and has no current projects.

DETERMINATION OF ISSUES

I

Cause does not exist for the imposition of discipline against the contractor's license held by Cullen Development Company pursuant to Business and Professions Code section 7017. Although it was established that Cullen Development abandoned work on the Rio Linda project, it was not established that the abandonment was without legal excuse, as set forth in Finding IV, V, and VI. Although mere

unforeseen difficulty or expense does not constitute impossibility of performance, and thus does not excuse performance, impossibility does constitute a defense when performance is impracticable because of excessive and unreasonable difficulty or expense. 1 Witkin, Summary of California Law (Ninth Edition, 1987), "Contracts", section 786, p. 709. Prevention or hindrance of the other party's performance excuses the obligation of performance as well. Civil Code section 1511(1), Witkin, op. cit., section 794, p. 717. If the consideration for the obligation fails in a material respect, the right to rescind the contract arises. Civil Code section 1689(b)(4).

As set forth in Findings V and VI, SHRA's acts, omissions, conduct and breaches of implied covenants and warranties caused a material failure of consideration, hindered Cullen's performance unreasonably, rendered Cullen's performance impracticable due to excessive and unreasonable expense and difficulty, and thus

established Cullen's right to rescind the contract. As rescission extinguished Cullen's continued obligation to perform, Cullen abandoned the work with legal excuse.

The contention that the contractor may not abandon the work for failure of the owner to pay for extras, as set forth in Karz v. Department of Professional and Vocational Standards, Registrar of Contractors (1936) 11 Cal.App.2d 554, 557, must fail. Karz reiterates the general rule, as recited above, that the contractor may not abandon the work or rescind the contract for the owner's breach, unless the breach "goes to the root of the consideration". In Karz, the owner's failure to pay for extra work was incidental and collateral to the main objective of the contract. In the instant matter, the collective whole of SHRA's conduct, including breach of promises to pay for extra work, among numerous other things, went to the root of the consideration and caused its material failure.

The contention by SHRA and the Deputy Attorney General that the conduct of SHRA in administering the other contracts cannot be considered in assessing the reasonableness of Cullen's conduct under the Rio Linda contract is misplaced. Cullen constructed the projects sequentially yet simultaneously, using the same crews, same contractors and the same administration. During most of the period at issue, three projects were under construction simultaneously. By the same token, SHRA administered each with the same staff, and although accounting was kept separate, the relationships and conduct of the parties treated the contracts as a continuous whole with separate phases. Further, SHRA was not constrained to seize funds due to Cullen on one project for alleged violations on another, stating "there's law" that allow it to do so. The conduct of SHRA on the Pomegranate and Date projects defined the relationships and set the stage for what occurred on the Rio Linda

project. The SHRA conduct on the previous projects substantially exhausted both Cullen's financial resources and its ability to continue to successfully work under unfair and unreasonable administrative practices that, by the time the Rio Linda contract was in full swing, made it apparent to Cullen that its profit, overhead and own capitol would be swallowed up to help SHRA pay for the work. To exclude references to the other projects in assessing what happened on the Rio Linda project would thus be manifestly unfair.

II

Cause does not exist for the imposition of discipline against the contractor's license held by Cullen Development Company pursuant to Business and Professions Code section 7113, in that it was not established that Cullen failed in a material respect to complete the Rio Linda project. As set forth in Findings III, IV, VI, VII, X, XI, XII, and XIII, Cullen rescinded the contract with legal justification, which

extinguished the obligation to complete the project for the contract price.

III

Cause exists for the imposition of discipline against the contractor's license held by Cullen Development Company pursuant to Business and Professions Code section 7108. As set forth in Finding XIV, Cullen Development failed to substantially account for the funds received from SHRA for the Rio Linda project.

IV

Cause does not exist for the imposition of discipline against the contractor's license held by Cullen Development Company pursuant to Business and Professions Code section 7111. As set forth in Finding XV, it was not established that Cullen refused to provide the records the Board requested.

ORDER

Contractor's license number 448299, classification B, issued to Cullen Development Company, is suspended for a period of thirty

(30) days, for the cause determined in Determination of Issues III. The period of suspension shall commence with the effective date of the adoption of this decision. Following the expiration of the period of suspension, the license rights shall be fully restored. The license shall not be reactivated following the expiration of the period of suspension until the bond requirements of Code of Civil Procedure section 996.340 have been met.

In all other respects the Accusation is dismissed.

Dated: May 22, 1990

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

APPENDIX E

LAW OFFICES OF BRENTON A. BLEIER
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1001 G Street, Suite 101
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Attorneys for Plaintiff

FILED: JUNE 21, 1987

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

-o0o-

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, A Public body corporate and politic, Plaintiff, v. JAMES CULLEN, MARK T. CULLEN, and RICHARD CULLEN doing business as CULLEN DEVELOPMENT COMPANY, and DOES 1 to 10, Defendants. AND RELATED CROSS-ACTIONS.	NO. 331596 JUDGMENT AFTER TRIAL BY SUPERIOR COURT

This cause came on regularly for trial on June 16, 1987 in Department 6 of the above-entitled court, the Honorable JAMES I. MORRIS,

Judge, presiding, sitting without jury, a jury having been duly waived. BRENTON A. BLEIER appeared as attorney for Plaintiff HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, Defendants JAMES CULLEN and CULLEN DEVELOPMENT COMPANY appeared Pro per by JAMES CULLEN. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and a statement of decision not having been requested,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered in the above-entitled cause in favor of Plaintiff HOUSING AUTHORITY COUNTY OF SACRAMENTO and against Defendants JAMES CULLEN and CULLEN DEVELOPMENT COMPANY in the sum of $366,261.94.

Dated: June 21, 1987

JAMES I. MORRIS
Judge of the Superior Court

Judgment entered on _____, 1987 in Vol. _____ of the Judgment Book, page _____.

_____
Clerk

By_____
Deputy Clerk

LAW OFFICES OF BRENTON A. BLEIER
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Attorneys for Plaintiff

FILED: OCTOBER 13, 1987

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

-oOo-

HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, A Public body corporate and politic, Plaintiff, v. JAMES CULLEN, MARK T. CULLEN, and RICHARD CULLEN doing business as CULLEN DEVELOPMENT COMPANY, and DOES 1 to 10, Defendants. AND RELATED CROSS-ACTIONS.	NO. 331596 PROPOSED JUDGMENT AFTER TRIAL BY SUPERIOR COURT

This cause came on regularly for trial on June 16, 1987 in Department 6 of the above-entitled court, the Honorable JAMES I. MORRIS, Judge, presiding, sitting without jury, a jury

having been duly waived. BRENTON A. BLEIER appeared as attorney for Plaintiff HOUSING AUTHORITY OF THE COUNTY OF SACRAMENTO, Defendants JAMES CULLEN and CULLEN DEVELOPMENT COMPANY appeared Pro per by JAMES CULLEN. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and a statement of decision not having been requested,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered in the above-entitled cause in favor of Plaintiff HOUSING AUTHORITY COUNTY OF SACRAMENTO and against Defendants JAMES CULLEN and CULLEN DEVELOPMENT COMPANY in the sum of $366,261.94, and that Defendants take nothing by their Cross-Complaint.

This judgment is entered nunc pro tunc and is effective June 21, 1987.

Dated: October 13, 1987

JAMES I. MORRIS
Judge of the Superior Court

Supreme Court, U.S.
FILED
JUN 4 1993
OFFICE OF THE CLERK

(2)

No. 92-1765

In The

Supreme Court of the United States

October Term, 1992

CULLEN DEVELOPMENT COMPANY, et al.,

Petitioners,

v.

HOUSING AUTHORITY, COUNTY OF SACRAMENTO, et al.,

Respondent.

Petition For Writ Of Certiorari To The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether a judgment entered in an action against a general partnership and the individual partners in favor of the plaintiff on a complaint for breach of contract, and in favor of the plaintiff on the general partnership's cross-complaint for breach of contract, on the basis of a pro se appearance of one of the partners, deprived the partnership of its right to due process.

Whether application of the doctrine of collateral estoppel to preclude a partner, as to whom the initial trial was stayed by reason of pending personal bankruptcy proceedings, from litigating affirmative defenses to an action for breach of contract, by reason of the prior judgment against the partnership on the cross-complaint, deprived the partner of his right to due process.

Whether the trial court's failure to give collateral estoppel effect to a determination by an administrative agency, made after entry of judgment against the partnership, but before entry of judgment against the partner, that cause did not exist to discipline the partner for violations of the Contractor's Law in connection with the construction project that was the subject of the litigation, deprived the partner of his right to due process.

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No. 92-1765

In The

Supreme Court of the United States

October Term, 1992

CULLEN DEVELOPMENT COMPANY, et al.,

Petitioners,

v.

HOUSING AUTHORITY, COUNTY OF SACRAMENTO, et al.,

Respondent.

Petition For Writ Of Certiorari To The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

The underlying action arose out of a dispute over rights and obligations under a written agreement (hereinafter "the Contract") between Respondent, as owner, and Cullen Development Company, as general contractor, for construction of a multi-unit residential project known as the Rio Linda Family Residence ("the Project"). Cullen Development Company was a partnership comprised of Petitioner, and his brothers James Cullen and Richard Cullen. The Project consisted of three two-story frame buildings containing a total of twenty units, landscaping, and playgrounds.

The Project was awarded to Cullen Development Company on a low bid of $744,900. The Contract called for work to commence on the Project on August 20, 1984, and to be substantially completed by March 20, 1985. However, on April 22, 1985, with the Project only 46% complete, Cullen Development Company ceased work on the Project.

On the same date, Respondent made written demand to Cullen Development Company to return to the Project immediately and provide Respondent with a schedule of completion. Respondent received no response to the written demand. Respondent then took control of the Project, inventoried materials on the site, hired a full-time security guard, secured materials, and boarded up the Project to protect it from the weather. Respondent's architect inspected the Project and made an estimate of the cost of completion. The Project was ultimately completed by another contractor.

Respondent notified Cal-Farm Insurance Company ("Cal-Farm"), the surety which had provided a performance bond for Cullen Development Company, of the cessation of work, and requested payment under the bond. However, Cal-Farm had been placed under a receivership by the Insurance Commissioner of the State of California. Respondent intervened in the receivership proceedings, and after litigation over the adequacy of offers to purchase Cal-Farm, ultimately recovered $250,000 on the bond.

Respondent's First Amended Complaint, filed on July 22, 1985, named as defendants "James Cullen, Mark T. Cullen, and Richard Cullen, doing business as Cullen

Development Company." The First Amended Complaint also alleged facts concerning the capacity of Cal-Farm, its receivership, and a stay of actions against Cal-Farm that resulted from the receivership. Petitioner and his co-defendants, represented by the Law Offices of Charles W. Trainor, responded to the First Amended Complaint with a demurrer, which was overruled. They filed an answer on December 9, 1985 in which they pleaded as affirmative defenses the failure of the First Amended Complaint to state facts sufficient to state a cause of action, that Respondent was guilty of unclean hands, that Respondent's damages were not proximately caused by their conduct, that Respondent breached the Contract, and that Respondent had misrepresented material facts.

Respondent notified the trial court that the case was ready for trial by filing an At-Issue Memorandum on December 18, 1985. The court gave notice of arbitration and trial setting conferences on August 29, 1986, and trial was set for February 18, 1987. Shortly before trial, Defendants' attorneys sought Respondent's agreement to a stipulation for leave to file a cross-complaint with multiple causes of action.[1] Respondent, however, agreed to the stipulation on the condition that the cross-complaint contain only one cause of action for breach of contract. The cross-complaint was filed on February 5, 1987, less than two weeks prior to the trial date.

On February 6, 1987, Defendants filed a motion for an order amending the trial setting order to allow further

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[1] Under California law, leave of court must be obtained to file a cross-complaint after the cross-complainant's answer has been filed. Cal. Code Civ. Proc. § 428.50.

discovery. Counsel for Defendants cited the untimely filing of the Cross-Complaint, and their failure to complete discovery before the discovery cut-off in support of the motion. Counsel for Respondent submitted a declaration in which he stated counsel for Defendants had failed for nearly a year to inspect documents which had been set aside for them. The motion was denied on February 9, 1987. No courtrooms were available for trial on February 18, 1987, and the trial was continued to June 16, 1987.

On June 3, 1987, a Substitution of Attorneys[2] was filed with the trial court by which Respondent and his co-defendants substituted themselves, in propria persona, as counsel of record in place of their attorneys, which were then known as Trainor, Robertson & Smits. The Substitution of Attorneys included the statement "I accept the above substitution", followed by the signatures of the defendants. Petitioner signed twice, for himself in his individual capacity, and for the partnership. His signatures were dated May 29, 1987.

Notwithstanding the Substitution of Attorneys, Respondent's former counsel purported to make a "special appearance" on June 11, 1987 to move for an order to continue the June 16, 1987 trial date. A declaration in

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[2] Section 284 of California's Code of Civil Procedure provides as follows:

"The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

support of the motion filed by William H. Davis, one of Petitioner's former attorneys, recited that he discussed outstanding bills at a meeting with Petitioner in February, 1987. According to Mr. Davis, he advised Petitioner at the February, 1987 meeting that his firm would have to withdraw from representation if Petitioner and his co-defendants did not bring their account current. Mr. Davis' declaration also described a subsequent meeting with Petitioner regarding outstanding fees on April 10, 1987. According to Mr. Davis, he mailed the Substitution of Attorneys to Petitioner on May 4, 1987.

Petitioner also filed a declaration in support of the motion, in which he stated that he owed his former attorneys $14,177.79, and had been unable, for several months, to pay them. The declaration also recited that Petitioner and his co-defendants had been " . . . unable to retain new counsel . . . " and had " . . . attempted to work out a payment schedule . . . " with their former attorneys. The motion was denied on June 11, 1987, five days before trial.

The matter was called on the morning trial calendar of the presiding judge of the Sacramento Superior Court on June 16, 1987, and assigned to Honorable Horace E. Cecchittini. Petitioner exercised a peremptory challenge under Section 170.6 of the California Code of Civil Procedure.[3] While making the sworn statement required for

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[3] Section 170.6 of the California Code of Civil Procedure provides, in pertinent part, as follows:

"(1) No judge, court commissioner, or referee of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any

the challenge, Petitioner could not remember the name of the judge he was challenging. The presiding judge then trailed the matter as to Petitioner and Defendants James Cullen and Cullen Development Company to 1:30 p.m., to be tried before Honorable James I. Morris. Judgment was entered against Richard Cullen, who had failed to appear for trial, upon proof of the allegations of Respondent's First Amended Complaint.

At the afternoon hearing, Respondent appeared with a copy of an order of the United States Bankruptcy Court granting his petition for relief[4] under Chapter 11 of the Bankruptcy Code which he had filed only 10 minutes earlier. The trial court ordered proceedings stayed as to him. Trial proceeded as to James Cullen and Cullen Development Company, with Respondent in attendance at the counsel table. Petitioner informed the court that

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kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding.

(2) Any party to or any attorney appearing in any such action or proceeding may establish this prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of the party or attorney so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee. . . . "

[4] *In re: Mark Thomas Cullen*, E.D. Cal. No. 287-03434-A-11.

James Cullen had a speech problem, and requested permission to speak for him. The trial court inquired into the extent of James Cullen's problem, and permitted Petitioner to assist with trial.[5]

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[5] A portion of the transcript of the proceedings is reproduced in the Petition at page 10, Footnote 4. However, only a portion of the trial court's dialogue with James Cullen is reproduced, and missing text is not indicated by ellipses. The entire exchange was as follows:

"MARK CULLEN: Your honor, my brother has a little speech problem; do you mind if I speak for him?

THE COURT: Well, let me determine to what extent you have this speech problem.

Mr. James Cullen, have you understood all we have said here?

MR. JAMES CULLEN: No really. It's all above my head this level deal.

THE COURT: Well, you have previously had counsel, together with your brother, Mark Cullen, and you petitioned the Court to have counsel relieved and proceed in representing yourself, correct?

MR. JAMES CULLEN: Can I have my brother help me in this?

THE COURT: Mr. Bleier, do you have any objection to allowing Mark Cullen to assist his brother?

MR. BLEIER: I have no objection to allow him to assist, your Honor, but because he's in Pro Per I would want to have Mr. James Cullen's responses directly upon the recrod [sic], but I have no difficulty with their consulting.

THE COURT: All right. You can consult certainly and state anything for the record you want to Mark Cullen on behalf of your brother. But as far as entry of any of the admissions of the allegations in the complaint, they should come directly from your brother.

MR. MARK CULLEN: Okay. If you can ask questions one at a time instead of three-part questions, just one that might help.

MR. BLEIER: All right. Perhaps I should call Mr. James Cullen as a witness, your Honor. That might speed things along.

THE COURT: I think that's appropriate."

Judgment was formally entered as to Defendants James Cullen and Cullen Development Company in the amount of $366,261.94. on July 21, 1987, and as to Defendant Richard Cullen on June 22, 1987. The judgments were later amended, nunc pro tunc, to add the words " . . . and that Defendants take nothing by their Cross-Complaint."

In addition to its civil action, Respondent filed complaints against Cullen Development Company with the California Contractors State License Board ("CSLB"), the administrative agency responsible for enforcing the California Contractors Law. In response to the complaints, the Registrar of Contractors began proceedings against Cullen Development Company in November, 1988 to determine whether it should be disciplined for violations of the Contractors Law. As noted in the Petition,[6] the proceedings resulted in an administrative decision which included findings critical of Respondent, and in favor of Cullen Development Company on all charges except for failure to substantially account for funds on the Project. Petitioner's contractor's license was suspended for 30 days.

Petitioner failed to file status reports, schedules, or a plan of reorganization with the Bankruptcy Court, and failed to attend the section 341 meeting of creditors. After giving Petitioner numerous notices and warnings of sanctions, the Bankruptcy Court permitted him to enter a voluntary dismissal and ordered the case dismissed on

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[6] Appendix D to the Petition.

December 7, 1989. Respondent filed another at-issue memorandum with the trial court on December 27, 1989.

On May 20, 1990, Petitioner filed another petition for relief under Chapter 11 of the Bankruptcy Code.[7] On June 18, 1990, Petitioner filed a schedule of unsecured creditors on which he listed a debt to Trainor, Robertson & Smits in the amount of $8,000. Petitioner did not serve Respondent with the second bankruptcy petition, or advise the trial court of the automatic stay. On August 16, 1990, the United States Trustee filed a motion by which it requested conversion or dismissal of the case, or appointment of a trustee, or establishment of a bar date. An order of dismissal was entered on October 9, 1990.

On August 14, 1990, more than five years after the complaint was filed, Petitioner filed a motion requesting leave to amend his Cross-Complaint to add fifteen causes of action. Respondent cited the decision in the administrative proceedings as grounds for the amendment. An order denying the motion was entered on September 18, 1990. On September 27, 1990, Respondent moved for summary judgment on the Cross-Complaint, arguing that the issue of Respondent's liability on the Cross-Complaint was adjudicated by the judgments entered June 16, 1987, and that the doctrine of collateral estoppel precluded Petitioner from further litigation of issues raised by the Cross-Complaint. The evidentiary support for Respondent's motion established Petitioner's capacity as

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[7] *In re: Mark Thomas Cullen*, E.D. Cal. No. 290-03451-A-11.

managing general partner of Cullen Development Company, and the finality of the June 16, 1987 judgment against the partnership. The motion was granted.

On February 11, 1991, the matter was assigned for trial to Department 6 of the Sacramento Superior Court before Honorable James I. Morris, with both parties waiving trial by jury. Respondent filed a written motion in limine for an order prohibiting, inter alia, introduction of evidence of damages pleaded in the Cross-Complaint. In addition to the matters set forth in the written motion, Respondent expanded the first category to seek to prohibit evidence in support of the affirmative defenses to the First Amended Complaint during pre-trial discussions in chambers. Respondent also orally moved to exclude evidence of the decision from the administrative proceedings.

Although the trial court initially granted the motion to the extent that the motion sought to preclude evidence of Petitioner's damages and the administrative decision, it asked for authority to support exclusion of evidence in support of Petitioner's affirmative defenses. The first day of trial then concluded after Respondent's opening statement. The trial court began the second day of trial by ruling against Respondent's motion in limine to the extent it sought to preclude evidence in support of Petitioner's affirmative defenses. However, after Respondent cited *Torrey Pines Bank* v. *Superior Court*, 216 Cal.App.3d 813, 265 Cal.Rptr. 217 (1989) as additional authority, the trial court agreed to consider the matter further.

Trial proceeded with Respondent's case in chief. On the afternoon of the second day of trial, the trial court indicated that, after review of *Torrey Pines Bank*, it was

inclined to grant Respondent's motion in limine as to evidence in support of Petitioner's affirmative defenses.

At the conclusion of trial, the trial court stated its findings as follows:

> . . . I will find by a preponderance of evidence that plaintiff has prevailed in their allegations of formation of and then breach of contract by defendant and award a judgment in Plaintiff's favor against defendant in the amount of three hundred sixty-two thousand six hundred and one dollars.

However, the trial court then stayed entry of judgment pending submission of written argument on the issue of the collateral estoppel effect of the administrative decision. After considering written arguments submitted by the parties, the trial court declined to give collateral estoppel effect to the administrative decision.[8] Judgment was entered on April 4, 1991 in favor of Respondent on the complaint in the amount of $362,601, and against Petitioner on the Cross-Complaint.

The Court of Appeal of the State of California for the Third Appellate District affirmed judgment against Petitioner on November 20, 1992. The Supreme Court of the State of California denied a Petition for review on February 10, 1993.

Petitioner also pursued an action against his former attorneys for professional negligence.[9] In a decision

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[8] See Appendix C to the Petition.

[9] *Cullen* v. *Trainor, Robertson, Smits & Wade*, Sacramento Superior Court No. 520230.

issued January 4, 1993, and modified February 1, 1993,[10] the Court of Appeal of the State of California for the Third Appellate District affirmed a judgment of dismissal, and the California Supreme Court denied a Petition for Review on March 31, 1993.

SUMMARY OF THE ARGUMENT

Facts which Petitioner describes as "critical" to his Petition are suspect or demonstrably false. Petitioner's accounts of the events connected with the withdrawal of his former attorneys are not supported by the record below, and contradict a schedule filed by Petitioner in bankruptcy proceedings. The record below does not support Petitioner's contentions that his former attorneys abandoned him, that James Cullen was incapable of appearing for himself or Cullen Development Company.

No appeal having been taken, the judgments entered against Petitioner's co-defendants on June 16, 1987 are final. The scope of Petitioner's appeal was limited to the judgment entered April 4, 1990, and nonappealable orders entered prior to those judgments from which Petitioner could not have otherwise appealed. The Court of Appeal properly declined to consider Petitioner's contentions of error at the 1987 trial.

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[10] The opinion, modified opinion, and order of the California Supreme Court are attached as Appendix A, Appendix B, and Appendix C, respectively. Pursuant to Rule 201 of the Federal Rules of Evidence, Respondent requests the court to take judicial notice of the opinions and order.

The trial court correctly applied the doctrine of collateral estoppel in precluding Petitioner from relitigating the judgment against Cullen Development Company, and in declining to find that Petitioner's successful defense of the administrative proceedings constituted an adjudication of issues of Respondent's civil action.

ARGUMENT

A. CORRECTIONS TO MISSTATEMENTS OF FACT

Many factual assertions in the Petition are inaccurate and/or unsupported by the record below. While some of the inaccuracies are inconsequential, others concern matters described by Petitioner as "critical," such as the declaration filed in support of the defense motion to continue the June 16, 1987 trial date:

> On June 8, 1987, Trainor called petitioner, who was residing in Arizona, stating that the court would require a Declaration from petitioner in order to hear a Motion to Continue the scheduled trial date. Trainor dictated the contents of said Motion (dated June 8, 1987) that Trainor requested. Two critical statements in the Declaration were that petitioner allegedly owed Trainor legal fees, and that, petitioner desired to be placed, In Pro Se. *Each of these statements were fabricated by Trainor to delay the pending trial date.* [¶]At the time of this Declaration, Trainor knew that the firm was paid in full, with extra monies still on retainer.

Petition, pp. 7-8, emphasis original.

Petitioner's description of the events suggests that he drafted the declaration as his former attorney dictated the contents over the telephone. Petitioner does not explain why, if he knew that the statements made in the declaration were untrue, he nevertheless signed the declaration. Moreover, Petitioner's contention that the "two critical statements" were fabricated raises questions about the propriety of his role in causing the declaration to be filed, and the credibility of representations he makes in his Petition.

In his declaration, Petitioner swore that he was indebted to his attorneys for approximately $14,000, and had not been able to pay them for several months. He also stated that he and his co-defendants had attempted to work out a payment schedule with their former attorneys. As noted above, Petitioner acknowledged a debt to his former attorneys in his second bankruptcy action. In a memorandum filed on October 16, 1990 in opposition to Respondent's motion for summary judgment, Petitioner contended that his former attorneys had "squandered" the funds that Petitioner had available for litigation. Finally, Petitioner alleged in his action against his former attorneys that they had informed him that they did not file a Cross-Complaint due to Petitioner's lack of funds.[11]

In a declaration filed in support of the motion to continue the June 16, 1987 trial, William H. Davis, one of Petitioner's former attorneys, stated that he discussed outstanding bills at a meeting with Petitioner in February, 1987. According to Mr. Davis' declaration, he advised

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[11] See Appendix A to this Brief in Opposition, p. A-5.

Petitioner at the February, 1987 meeting that his firm would have to withdraw from representation if Petitioner and his co-defendants did not bring their account current. Mr. Davis' declaration also describes a subsequent meeting with Petitioner regarding outstanding fees on April 10, 1987.

Even if one accepts that Mr. Davis drafted his declaration to portray himself in a favorable light, the detail recited in his declaration, including dates and names of other persons in attendance at the meetings, has a greater air of credibility than the conclusory allegations of Petitioner's account. Furthermore, viewed in the light of admissions made by Petitioner in other proceedings, his contention that the statement concerning unpaid legal fees was a fabrication is not credible. His assertion that his former attorneys fabricated the statement that Petitioner wished to represent himself is even less credible. According to Petitioner's own account, Trainor dictated the contents of Petitioner's declaration ten days after Petitioner signed the Substitution of Attorneys, and five days after the Substitution of Attorneys was filed with the trial court.

Undoubtedly, the declarations filed with the motion to continue the June 16, 1987 trial date, as well as the procedural maneuvers and bankruptcy filing on the trial date, were part of a poorly conceived and ineffectual plan to delay trial. It also appears obvious that Petitioner was a willing participant in the plan. Since that time, however, he has freely rewritten the history of those events to suit the needs of the moment.

In this action, the action against his former attorneys, and the two bankruptcy proceedings, Petitioner has shown a proclivity to recast the past to suit current objectives. For example, the proposed First Amended Cross-Complaint submitted with Petitioner's motion for leave to amend alleged that Cullen Development Company was an existing entity. Only two months later, while opposing Respondent's motion for summary judgment on the Cross-Complaint, Petitioner argued that Cullen Development Company ceased to exist subsequent to April 22, 1985.

In his declaration in support of his motion for leave to amend the cross-complaint, Petitioner stated that the attorney who represented him in his first bankruptcy proceedings handled the case to his satisfaction. However, only one month later, in his second bankruptcy action, Petitioner filed a brief in opposition to the U.S. Trustee's motion in which he asserted that his bankruptcy attorney had failed to represent his best interests.

B. THE PETITION IS UNTIMELY TO THE EXTENT IT CHALLENGES THE 1987 JUDGMENTS AGAINST PETITIONER'S CO-DEFENDANTS

Petitioner's invitation to this Court to review the judgments entered against his co-defendants in 1987 must be denied as beyond the jurisdiction of this Court. "The appellate jurisdiction in the Federal system of procedure is purely statutory. [Citation.]" *Heike* v. *United States*, 217 U.S. 423, 428, 30 S.Ct. 539, 54 L.Ed. 821 (1910). By statute, the jurisdiction of this court extends to "final judgments or decrees rendered by the highest court of a State in

which a decision could be had . . . ." 11 U.S.C.S. § 1257, subd. (a). In *Hammerstein* v. *Superior Court*, 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135 (1951), this court dismissed a writ of certiorari, even though it concluded that jurisdiction existed, because the petitioner had failed to appeal from entry of default judgment. *Id.*, at p. 492.

Petitioner devotes a considerable amount of argument to the June 16, 1987 trial. He contends that it was error for the trial court to permit trial to proceed as to Cullen Development Company on the basis of the presence of James Cullen, one of the partners.[12] He contends that it was error for the trial court to permit trial to proceed against James Cullen, who he characterizes as "illiterate and speech impaired."[13] He invites this court to review not only the judgment entered against him in 1992, but also the judgment entered against Cullen Development Company in 1987.[14]

No appeal was taken by Richard Cullen, James Cullen, or Cullen Development Company from the judgments entered against them in 1987. The scope of Petitioner's appeal was limited to the judgment entered April 4, 1990, and nonappealable orders entered prior to those judgments from which Petitioner could not have otherwise appealed, the orders granting Respondent's motion for summary judgment, denying Petitioners motion for leave to amend his Cross-Complaint, and granting Respondent's motion in limine. Accordingly,

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[12] Petition, pp. 18-28.

[13] *Ibid., supra*, at p. 29.

[14] *Ibid., supra*, at p. 34.

this court should conclude, as did the Court of Appeal, that the judgments against Petitioner's co-defendants " . . . are now final and may not be attacked . . . ."[15]

C. CULLEN DEVELOPMENT COMPANY WAS NOT DEPRIVED OF ITS RIGHT TO DUE PROCESS

This court recently visited the subject of pro se appearances by collective entities in *Rowland* v. *California Men's Advisory Council*, ___ U.S. ___, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993). Although the rule against pro se appearances by artificial entities in federal courts is well-established, a partner was allowed to appear for a partnership in *United States* v. *Reeves*, 431 F.2d 1187 (9th Cir. 1970) (per curiam). *Reeves* was described as an "aberrant case" which neither followed nor established "federal precedent." *Rowland, supra*, ___ U.S. at p. ___, slip opinion at p. 7, and fn. 5. However, the rationale for the prohibition does not have a constitutional dimension, but is based upon " . . . the Centuries-old concept of a Court, having a lawyer before it who has been qualified to practice, and who is subject to the Court's control." *Turner* v. *American Bar Assn.*, 407 F.Supp 451, 476 (ND Tex., 1975).

California law does not prohibit a partner from appearing pro se as the representative of a general partnership. While there is no definitive statute or case law which affirmative extends the right of self-representation to partnerships, a justice of the California Supreme Court

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[15] Appendix B to the Petition, p. B-4.

has observed that partners have long enjoyed the privilege of appearing in pro se on behalf of their partnerships. See *Merco Constr. Engineers, Inc.* v. *Municipal Court*, 21 Cal.3d 724, 734, 147 Cal.Rptr. 631 (1978). There are significant differences between corporations and limited partnerships, to which Petitioner freely analogizes, and general partnerships, which justify treating the entities differently.

While a corporate or limited partnership organization provides the individual equity holders with limitations on risk, they also severely limit their right to control the operations of the organization. The equity holders own an interest in the entity itself. See, e.g., Cal. Corp. Code § 15518. In a general partnership, on the other hand, "a partner is coowner with the other partners of specific partnership property holding as a tenant in partnership." Cal. Corp. Code § 15025, subd. (1). As the entity whose laws give existence to and govern the operation of the various organizations, the State of California is uniquely qualified to determine the circumstances under which they may appear in its courts. While the Petition establishes a number of uncontested truisms about the nature of business organization, it fails to provide a compelling argument that would justify review of California's practice of permitting general partnerships to appear in pro se, much less a ruling that the practice is constitutionally deficient.

In any event, the Substitution of Attorney was made "upon the consent of both client and attorney, filed with the clerk . . . ." Cal. Code Civ. Proc. 284, subd. (1). Notwithstanding Petitioner's contention that he and his co-defendants were abandoned by his former attorneys, the document itself and all inferences that can be drawn

from the record indicate that Petitioner consented to the substitution.

Of the three methods of effecting a substitution of counsel under California law, only one method does not require the active participation of the court. Had Petitioner or his co-defendants refused to sign the Substitution of Attorneys, their former attorneys would have had to obtain leave of court to withdraw their appearance. Cal. Code Civ. Proc. 284, subd. (2). Petitioner and his co-defendants would then have had an opportunity to argue that a substitution of counsel would prejudice their interests. But the objective of the Substitution of Counsel, as Petitioner readily admits, was to delay trial. When that tactic proved ineffective, Petitioner fell back upon his second line of defense and petitioned for protection under the Bankruptcy Code. As a willing participant in the scheme to delay trial, Petitioner should not now be heard to complain that the judgments entered against his co-defendants was the result of abandonment by their former attorneys.

D. PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO DUE PROCESS

In essence, Petitioner's complaint is with entry of judgment against him. It is important, in considering his arguments, to bear in mind that the action was commenced on July 22, 1985, that the trial court gave notice of the final stages of the litigation on August 29, 1986, and that trial did not take place until nearly two years after the complaint was filed. Petitioner is simply mistaken when he asserts that due process guarantees him the

right to a trial on the merits of each issue, in the broadest sense of a trial.

Procedural devices, such as the motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, California's statutory demurrers, and the motion for summary judgment may severely restrict or eliminate the trial on the merits without depriving litigants of the right to due process. Due process requires notice and the *opportunity* to be heard. Petitioner had the opportunity to have a trial on the merits on June 16, 1987. When the rights and liabilities of Cullen Development Company were adjudicated, the scope of Petitioner's possible defenses were necessarily narrowed, as Petitioner had no rights against Respondent which did not arise out of the Contract.

Petitioner's argument against application of the doctrine of collateral estoppel relies heavily upon his preceding arguments concerning the wrongful conduct of his former attorneys in "abandoning" him, and the trial court in permitting the "abandonment" and in entering judgment against the partnership on the basis of James Cullen's appearance. For a substantive rule of collateral estoppel against governmental agencies, the Petition suggests privity without limitation.

The mere nature of the parties, however, is an insufficient basis to establish privity. The fact that Respondent and the CSLB are both public entities is not, in itself, sufficient to support a finding of privity. See *People* v. *Dawkins*, 195 Cal.App.3d Supp. 1, 6-7, 241 Cal.Rptr. 456 (1987); *City of Gilroy* v. *State Bd. of Equalization*, 212

Cal.App.3d 589, 606-607, 260 Cal.Rptr. 723 (1989). "Privity . . . 'represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principal of preclusion.' " *Dawkins, supra*, 211 Cal.App.3d Supp. at p. 6, quoting Vestal, *Preclusion/Res Judicata Variables: Parties* (1984) 50 Iowa L.Rev. 27, 45.

It is not merely the relationship, but the functions and roles played by the two parties in the related matters that is determinative on the issue of privity. See *Dawkins, supra*, 195 Cal.App.3d Supp. at pp. 6-7; *City of Gilroy, supra*, 212 Cal.App.3d at pp. 606-607. Respondent, as the owner of any construction project, had the right to complain to the CSLB about the conduct of a contractor. Like any other owner, it was not a party to the administrative proceedings. It did not direct or control the prosecution of the proceedings, and did not have the right to introduce evidence, cross-examine witnesses, argue points of law, or seek further review of the administrative decision. Petitioner had all of those rights.

Although the administrative decision is final and conclusive on the issue of whether cause existed to impose discipline against Cullen Development Company, the administrative decision is based upon obvious errors of law. For example, Petitioner was allowed to parade disgruntled contractors before the administrative law judge to prove "a well-developed style of doing business." Respondent had no opportunity to cross-examine the accusers, call rebuttal witnesses, or object to the use of evidence of past conduct to prove conduct on a specific occasion. Respondent did not have the opportunity to advise the administrative law judge that the style of

business consisted of actions mandated by federal regulations, such as impounding of funds to satisfy pending wage claims. See, e.g., 29 C.F.R. § 5.5(b)(3).

CONCLUSION

Petitioner's contention that an injustice resulted from the sum of the errors is based upon a contrived statement of facts. However, Petitioner has made so many contradictory factual allegations in this and related litigation that his version of the events is not credible. If there has been any consistency in Petitioner's approach, from construction of the Project through each successive brief, it has been his recasting of the facts to shift the blame to others. While Petitioner may or may not be solely responsible for the adverse judgments entered against him and his co-defendants, he was a willing participant in the scheme to avoid trial. Unlike Respondent, who had no opportunity to defend itself against the recriminations of disaffected contractors, Petitioner had opportunity enough to defend against the complaint and prosecute a Cross-Complaint.

Whether that the opportunity was squandered by others, or by Petitioner himself, due process does not require that Petitioner be given a second opportunity.

Dated: June 4, 1993

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MARK T. CULLEN, Plaintiff and Appellant, v. TRAINOR, ROBERTSON, SMITS & WADE et al., Defendants and Respondents.	)	C012365 (Super. Ct. No. CV520230 (Filed Jan. 4, 1993)

This is an appeal from a judgment following dismissal after a general demurrer was sustained without leave to amend. Plaintiff Mark Cullen seeks to prosecute a cause of action against defendants Trainor, Robertson, Smits & Wade, the law firm whose attorneys represented him during a lawsuit brought against him for breach of contracts to construct public housing for the County of Sacramento. He claims that the law firm abandoned its defense and failed to prosecute a counter claim against the plaintiff in that action. A general demurrer was sustained on the ground that the action is barred by the statute of limitations, Code of Civil Procedure section 340.6.[1]

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[1] References to a section are to the Code of Civil Procedure unless otherwise indicated.

Cullen contends that the trial court erred in applying the statute of limitations. We will conclude that the statute of limitations began on the date the judgment in the underlying action was entered against the partnership of which Cullen was a member, October 13, 1987, for that is the date upon which he suffered injury to his interests. That date is more than one year from the date on which the complaint in this action was filed, April 29, 1991. We also will conclude that the limitations period was not tolled by reason of an alleged fraud in the nondisclosure of defendants' failure to meet the claims statute, an alleged predicate to success on the cross-complaint brought in the Housing Authority action, because such a fraud was not a legal cause of the injury sustained.

We will affirm the judgment (order of dismissal).

FACTS AND PROCEDURAL BACKGROUND

Cullen's first complaint for malpractice in this action was filed on April 29, 1991. The verified complaint was filed in propria persona, on his own behalf and in the name of Cullen Development Company, a partnership. He alleged, among other things, that Cullen Development Company suffered severe financial damages as a result of the same alleged attorney malpractice of which he complains. A demurrer was sustained to the first complaint as to Cullen Development Company without leave to amend and with respect to Cullen with leave to amend. No issue is tendered on the appeal concerning the propriety of the demurrer granted with respect to Cullen Development Company.

The demurrer we review was granted as to Cullen's first amended complaint, styled "Further Amended First Amended Complaint" consisting of an introduction and four counts. Stripped of conclusions of law, evidentiary matter (see 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, §§ 338, 346), and immaterial asides the complaint makes the following material allegations of fact.

In September 1985 Cullen retained Trainor, Robertson, Smits & Wade (Counsel) to represent him in the defense and prosecution of a cross-complaint in a lawsuit brought against him by the Housing Authority of Sacramento County (Housing Authority). Cullen was led to believe that the cross-complaint would include counts stating causes of action for breach of contract and tortious breach of contract. Counsel failed to file a governmental tort claim as a predicate for the contemplated cross-complaint within the period prescribed by statute. The cross-complaint, filed on February 5, 1987, asserted only a cause of action for breach of contract. Counsel also failed to prepare properly for trial. Counsel concealed the true reason for failing to file the cross-complaint as originally proposed and informed Cullen that the original scope of the cross-complaint could be achieved under affirmative defenses and by way of an amendment to conform to proof at trial.

Less than a month before the scheduled trial date of June 16, 1987, Counsel informed Cullen that they desired to terminate the attornment. At their request, Cullen signed the papers substituting him as his own attorney and the substitution was filed two weeks prior to trial. The day before trial Counsel advised Cullen that if the matter came on for trial as scheduled he could delay the

trial by peremptorily challenging the first judge assigned and filing a bankruptcy petition to obtain a stay of pending proceedings against him. Counsel failed to inform Cullen of the proper method to file a bankruptcy when both an individual and a partnership were involved. In terminating the attornment Counsel "again concealed their procedural errors, by not informing [Cullen] of [their] procedural errors to date."

Cullen had a meritorious defense and counterclaim in the Housing Authority lawsuit. If Counsel had acted competently in representing him he would have prevailed. During 1989 Cullen represented himself and Cullen Development Company, a general partnership operating under a general building contractor's license of which Cullen was the qualifying partner, in an administrative hearing before the Registrar of Contractors, defending against an accusation that discipline was warranted against the license because of failure to complete the contracts in issue in the Housing Authority's lawsuit without legal excuse. On June 25, 1990, the Registrar of Contractors issued a decision in the matter finding that discipline was not warranted on the ground of failure to complete the contracts because the failure was caused by misconduct of the Housing Authority in the administration of the contracts.

On August 30, 1990, Cullen filed a motion to amend his cross-complaint in the Housing Authority lawsuit. On September 7, 1990, the motion was denied. On October 30, 1990, the court granted a partial summary judgment motion in favor of the Housing Authority denying relief under the cross-complaint. On April 4, 1991, judgment

was entered against Cullen in favor of the Housing Authority.

Despite numerous opportunities to disclose their negligence in failing to file a governmental tort claim counsel failed to do so. Counsel concealed this negligence by falsely stating to Cullen, for the purpose of deceiving him, that the reason they delayed in filing the cross-complaint and filed the abbreviated version of the cross-complaint was Cullen's lack of funds. The true reasons were that counsel failed to research the Tort Claims Act in a timely fashion, failed to file a governmental tort claim within the required time, and failed to do the research necessary to find an exception to cure their error.

Cullen relied upon the misrepresentation in believing that counsel had made a zealous effort to file the appropriate cross-complaint. He did not discover Counsel's failure to file a governmental tort claim until the fall of 1989. That ends the pertinent allegations in Cullen's complaint.

Counsel demurred contending that Cullen's first amended complaint fails to state a cause of action not barred by the applicable statutes of limitations. The demurrer attacks the complaint, viewed in the context of matters occurring in the Housing Authority lawsuit – of which judicial notice had been taken in proceedings on the earlier demurrer. The record of that litigation shows the following. The defendants in the Housing Authority lawsuit included Cullen and Cullen Development Company. When the matter came on for trial on June 16, 1987, it was stayed as to Cullen because of his bankruptcy

petition filing but went forward as to the other defendants. At the conclusion of the trial, the court announced that judgment would be granted in favor of the Housing Authority against Cullen Development Company. On October 13, 1987, that judgment was entered.

After the bankruptcy stay was lifted as to Cullen the Housing Authority lawsuit proceeded as to him. The issues tendered in the cross-complaint were resolved in favor of the Housing Authority in a partial summary judgment which was based upon the theory the earlier judgment against Cullen Development Company warranted issue preclusion against Cullen.

The trial court in this action sustained the demurrer to Cullen's first amended complaint.

DISCUSSION

Introduction

I

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187].) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42 [172 P.2d 867].) When a demurrer is sustained, we determine whether the complaint states

facts sufficient to constitute a cause of action. (See *Hill v. Miller* (1966) 64 Cal.2d 757, 759 [51 Cal.Rptr. 689, 415 P.2d 33].) And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 781 [180 Cal.Rptr. 657, 640 P.2d 793]; *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636 [75 Cal.Rptr. 766, 451 P.2d 406].) The burden of proving such reasonable possibility is squarely on the plaintiff. (*Cooper v. Leslie Salt Co., supra*, at p. 636.)" (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

Cullen contends that the trial court erred in sustaining the demurrer. He argues that he should not have been barred under the statute of limitations pertaining to legal malpractice, section 340.6[2], for two reasons. The first is

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[2] Section 340.6 in pertinent part provides:

"An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

"....

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four year limitation;. . . ."

that he suffered no "actual damages" until the order denying him leave to amend the cross-complaint. The second is that he pled actual fraud in concealing the failure to file a governmental tort claim. We will discuss these claims seriatim; neither is persuasively supported and the contention of error is not meritorious.

II

Cullen claims that his cause of action is timely under section 340.6 because he suffered no "actual damages" until the order denying him leave to amend the cross-complaint. He asserts he "discover[ed] . . . the facts constituting the wrongful act or omission" of Counsel in the allegedly wrongful failure to prepare the case for trial in June 1987.

The question is when did Cullen "sustain actual injury" within the meaning of the statute. Defendants argue that Cullen sustained injury in 1987 when the adverse judgment was entered against Cullen Development Company, among other reasons, because "his interest in all partnership claims against the Housing Authority were [sic] lost and he had sustained injury at that time." The argument is persuasive.

The statutory provision that the limitations period is tolled during the time "the plaintiff has not sustained actual injury" is premised upon the view that the cause of action does not accrue until the alleged negligence results in some actionable harm to the plaintiff.

> "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty,

> causing only nominal damages, speculative harm, or the threat of future harm – not yet realized – does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice. Prosser states the proposition succinctly, 'It follows that the statute of limitations does not begin to run against a negligence action until some damage has occurred.' [¶] The cause of action arises, however, before the client sustains all, or even the greater part, of the damages occasioned by his attorney's negligence. Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue." (Budd v. Nixen (1971) 6 Cal.3d 195, 200-201, citations and fn. omitted.)

Cullen submits that he suffered no appreciable harm by reason of the adverse judgment in 1987 because the action was stayed with respect to his liability and his cross-claim against the Housing Authority. Cullen's implicit claim is that the harm he suffered while wearing his partnership hat cannot be considered harm to him under his individual hat. This is not persuasive.

"The underlying fallacy in respondent's argument is the assumption that the partnership is a distinct unit, separate from the members thereof. Occasional suggestions of this 'entity' theory of partnership are found in statutes or decisions, but apart from exceptional situations, a partnership is not considered an entity, but an association of individuals." (Reed v. Industrial Acc. Com. (1937) 10 Cal.2d 191, 192-193.) "A partner is a coowner

with the other partners of specific partnership property holding as a tenant in partnership." (Corp. Code, § 15025, subd. (1).) As related, Cullen alleged in his first verified complaint that the partnership suffered the loss of a valuable property right, a chose in action, under the adverse judgment by reason of the alleged malpractice of Counsel. Cullen suffered appreciable harm in the loss or destruction of this partnership property of which he was a coowner.

As a partner Cullen could have commenced an action to recover for the alleged malpractice upon the entry of the adverse judgment on the partnership's cross-complaint. (See Laird v. Blacker (1992) 2 Cal.4th 606, 615; Corp. Code, § 15009; see generally Owens v. Palos Verdes Monaco (1983) 142 Cal.App.3d 855.) The policy of the statutes of limitation is one of repose, to preclude the assertion of stale claims. (See 3 Witkin, Cal. Procedure, supra, Actions, § 309.) In these circumstances, an exceptional recognition of a partnership "entity" theory would defeat this policy and is unwarranted.

Cullen also makes a protracted argument that is an attempted collateral attack in this court on the judgment in 1987 in an independent lawsuit. He argues that judgment should be found "not controlling in the case at bar" because in his view the trial court in that lawsuit erred in failing to stay the proceedings against his partners and Cullen Development Company as a result of his filing of a bankruptcy petition. He argues that the trial court in that lawsuit lacked jurisdiction to enter judgment against his codefendants because it had an adverse effect on his bankruptcy estate. He requests that we "vacate" the 1987 judgment in the Housing Authority action. He also

argues that the degree of misconduct of Counsel was so egregious as to warrant equitable relief from the adverse 1987 judgment.

We imply no view on the potential merit of these arguments if raised in an appropriate forum. This is not such a forum. The 1987 judgment was obtained in an entirely different action than the one we review. It runs in favor of a different party. If the 1987 judgment can be "vacated" or otherwise overcome that must occur in an action to which the parties to that judgment are joined. If Cullen were to succeed in such an endeavor he could pursue his original remedy against the alleged underlying malefactor and has no claim against Counsel for depriving him of that remedy. If not, then it follows, as Cullen himself artlessly suggests, harm was done to him in the entry of the judgment in 1987 and at that point time under the one year period of limitations provided in section 340.6 pertaining to his cause of action against Counsel began to run.

III

Failing these claims Cullen argues that the statute of limitations was tolled until his discovery that defendants fraudulently concealed their alleged negligence in failing to file a governmental tort claim which would have allowed them to plead a tort theory in the cross-complaint against the Housing Authority as an alternative to the contract theory which was plead. This, he argues, renders section 340.6 inapplicable.

This theory is based upon the view that, in addition to the cause of action for malpractice for abandonment of

his defense to the Housing Authority action, Cullen stated a cause of action for fraud relating to his cross-complaint which could be maintained within three years of discovery under section 338, subdivision (d).[3] That discovery, so he alleges, occurred in August 1989 when he became aware of the concealment. The argument does not attend to the language of section 340.6, which distinguishes between "actual fraud", that is excepted from its ambit, and "wilfully conceal[ing] the facts constituting the wrongful act or omission when such facts are known to the attorney. . . . "

Regardless of that distinction, Cullen's argument fails for the reason that the alleged fraud was not the legal cause of his injuries. "[T]he actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." (Rest.2d Torts, § 432, subd. (1).) As discussed above, Cullen's interests were injured when the judgment was entered against Cullen Development Company in favor of the Housing Authority on its complaint and against the company on its cross-complaint. As explained, the statute of limitations started to run on regarding Cullen's malpractice claims predicated upon defendants' failures to defend against the Housing

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[3] Section 338, subdivision (d), provides a three year period of limitation for "An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Authority action. For the same reason the statute of limitations started to run against Cullen's malpractice claims regarding the cross-complaint.

Cullen seeks to prize off a tort theory of liability from the contract theory which was pled in the cross-complaint. He claims the tort theory could have been brought if a governmental tort claim had been filed against the public entity. As to this theory he claims the statute of limitations was tolled until discovery of the reason why the tort theory was not pursued. The viability of this theory is dependent upon its survivability as an independent cause of action. That is the defect in the argument.

Whether the cross-complaint sounded in tort or in contract or both, it advanced but one cause of action. Had the defendants done what Cullen says they should have done, i.e., timely filed a tort claim and amended the cross-complaint to advance this as an additional but alternative theory of recovery, the unfavorable default judgment nonetheless would have been entered in the Housing Authority case and would have barred any subsequent action on the claim. The judgment entered in favor of the Housing Authority adjudicated the merits of Cullen's crosscomplaint against the Housing Authority regardless of theory of recovery. (See generally, Perry v. Robertson (1988) 201 Cal.App.3d 333.) The cause of harm to Cullen thus occurred at the point of entry of the judgment on the cross-complaint. For the reasons already advanced, the statute of limitations then began to run on claims arising out of loss of that cause of action. The alleged failure to plead the tort theory and the "fraudulent" failure to disclose the reason did not cause Cullen

any harm because it cannot be said that Cullen would have recovered "but for" these wrongs.

DISPOSITION

Cullen's motion for judicial notice on this appeal of certain materials in the record of his appeal in the Housing Authority v. Cullen litigation is denied. The judgment (order of dismissal) is affirmed.

BLEASE, J.

We concur:

PUGLIA, P. J.

SCOTLAND, J.

APPENDIX B

NOT FOR PUBLICATION

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MARK T. CULLEN, Plaintiff and Appellant, v. TRAINOR, ROBERTSON, SMITS & WADE et al., Defendants and Respondents.	)	C-12365 (Super. Ct. No. CV520230)

OPINION ON DENIAL OF PETITION FOR REHEARING

(Filed Feb. 1, 1993)

Cullen petitions for a rehearing. His sole noteworthy complaint is that the opinion's principal theory of resolution of his fraud claim does not squarely extend to part of his case. While the point has arguable merit, the underlying claim has no merit for reasons that closely parallel those given in the opinion.

Cullen had worked on four construction contracts for the Housing Authority, all of which were cancelled in April 1985. The Housing Authority filed its suit, in July 1985, for breach of contract as to only one of these, the Rio Linda contract. Cullen retained the defendant law firm and they agreed to file a cross-complaint for damages for breach on all four contracts on tort and contract

theories. The cross-complaint defendants filed, in February 1987, was limited to the Rio Linda contract and only presented a theory sounding in contract. As explained in the opinion, Cullen sustained actual injury when this cause of action was lost in the trial of June 1987.

Cullen represented himself thereafter. He alleged that, when he learned of the Tort Claims Act in law school in the fall of 1989, he discovered defendants had defrauded him by failing to tell him that they had impaired his opportunity to pursue tort theories on the four causes of action. On August 14, 1990, he filed a motion to amend his existing cross-complaint, apparently seeking, inter alia, to add counts stating causes of action for damages on the other three contracts. The Housing Authority opposed this motion and it was denied.

Cullen suggests that the theory in the opinion rejecting his fraud claim for lack of causation of harm only pertains to the Rio Linda contract cause of action that had been stated in the original cross-complaint. He argues that he was defrauded by defendants concealing their failure to file government tort claims as to the other three contracts, and as to this he suffered no actual harm until the denial of his motion to amend in 1990. He submits that the statute of limitations to litigate the three other contract claims was not barred by the statute of limitations because "they relate back" to the date the Housing Authority sued him on the Rio Linda contract.

The relation back theory is untenable. (See 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, §§ 1161-1162.) A claim of breach of separate contracts concerning the construction of structures at different locations is a wholly

different legal liability or obligation from that stated in the original cross-complaint and cannot relate back for purposes of evading the statute of limitations.

Cullen knew in 1987 that the cross-complaint prepared by defendants did not put in issue the other three contract causes of action. He took no action to pursue these causes until 1990. Assuming for the sake of discussion that defendants concealed a failure to file government tort claims concerning these contracts, no harm to Cullen can be attributed to this delict.

These causes of action must have arisen prior to April 1985 when all of the contracts were terminated. If, as Cullen suggests, these were independent causes of action, he was free to pursue them in an independent action or to move to amend and include them in the existing action. The failure to do so until after the expiration of the period of limitations on an action for breach of contract is the cause of any harm for loss of a judicial remedy on the causes of action. Defendants' failure to disclose that they had not filed government tort claims did not prevent Cullen from pursuing these causes of action on a theory sounding in contract. Having slept on his rights sounding in contract, if any, to recover from the Housing Authority for the breach of these three contracts, Cullen cannot recover from his former counsel for failing to perfect a potential *alternative* remedy, for the reasons given in the opinion.

The petition for rehearing is denied.

BLEASE, J.

We concur:

PUGLIA, P. J.

SCOTLAND, J.

APPENDIX C

Third Appellate District No. C012365
S031216

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed March 31, 1993)

MARK T. CULLEN, Appellant

v.

ROBERTSON, SMITS & WADE TRAINOR Et Al.,
Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice